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No. 90-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

ROGER ENDELL, Commissioner,
Alaska Department of Corrections,
Petitioner,

versus

MICHAEL T. SMITH
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. 28 U.S.C. §2254(d) provides that findings of fact made by a state court are presumed correct. Did the Ninth Circuit violate this statute when it refused to apply this presumption to the Alaska courts' finding that Smith's remarks during custodial interrogation were not an invocation of his right to an attorney?

2. During his interview with the police, Smith asked the question "Can I talk to a lawyer?", but then, without waiting for a response, he immediately re-opened the discussion by saying: "At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?"

Did the Ninth Circuit misapply the rule of *Smith v. Illinois*, 469 U.S. 91 (1984), when it held that the Alaska courts and the federal district court could not rely upon this latter portion of Smith's utterance when construing the meaning of his first question?

3. Assuming Smith's remarks were no more than an ambiguous reference to counsel, after which he voluntarily re-initiated his discussion with the police, was it proper for the police to respond by explaining why they viewed Smith as a suspect, and then reminding Smith that he had a right to terminate the interview and talk to an attorney, before they allowed Smith to continue the interview?

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IN THE SUPREME COURT OF THE UNITED STATES

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ROGER V. ENDELL, Commissioner,
Department of Corrections, State of Alaska,

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versus

MICHAEL T. SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Roger Endell, Commissioner of Corrections for the State of Alaska, ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on November 14, 1988.

OPINIONS BELOW

The opinion of the Ninth Circuit is reproduced in the appendix to this petition; it is also reported at 860 F.2d 1528. The opinion of the U.S. District Court, the report and recommendation of the U.S. Magistrate, and the supplemental report and recommendation of the U.S. Magistrate are reproduced in the appendix.

The opinion of the Alaska court of appeals was not reported. It is reproduced in the appendix. No opinion was issued by the Alaska supreme court. The supreme court's order denying review is reproduced in the appendix.

JURISDICTION

This case involves a habeas corpus action filed by the respondent, Michael T. Smith. The decision of the Ninth Circuit was issued on November 14, 1988. Rehearing was denied on June 1, 1990. This petition for certiorari is submitted within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. §2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless . . .
>
> (8) . . . the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

STATEMENT OF THE CASE

A. *The Offense*

In late September 1981, in Anchorage, Alaska, Michael T. Smith murdered Ron and Darcell Cole, shooting them in the head with a handgun. Smith murdered Ron Cole because Smith owed Cole money for cocaine and could not pay him. Smith murdered Darcell Cole because she was a witness to the murder of her husband. After the murders, Smith fled to Hawaii.

B. *The Confession*

Smith returned to Anchorage on October 10, 1981. He was arrested at the airport for possession of cocaine. The police read Smith the *Miranda* warnings at the airport; he waived his rights. Smith asked to speak with someone else in law enforcement, so he was taken to Alaska State Trooper headquarters. Smith was interviewed by Sergeant Thomas Stearns and Trooper Charles Miller in Stearns's office.

Stearns re-advised Smith of his *Miranda* rights by reading the rights to Smith and by explaining the rights to Smith in detail. Smith executed a written waiver. Smith proceeded to explain that he had been selling cocaine for Ron Cole, that he owed Cole $15,000.00 for cocaine, that he didn't have the money, and

that he had been scared Cole would harm him, so he had left town. Sgt. Stearns then asked Smith whether he had shot Cole. Smith at first denied being involved in the death of Ron Cole. Then the critical portion of the interview occurred:

> STEARNS: Okay. So I take it that you did not get yourself in a position where you had to protect yourself, is that a . . . is that yes or no?
>
> SMITH: No.
>
> STEARNS: Okay, so [you're not saying] things went bad and you had to protect yourself? That's out of the question? You didn't have anything to do with his death.
>
> SMITH: Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?
>
> MILLER: Well, it . . . it wouldn't be fair to you to say we weren't, Mike.
>
> STEARNS: Yeah.
>
> SMITH: Because if you are, it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.

MILLER: Well, Mike, you yourself pointed out that . . . that anybody that might be found in that notebook [Ron Cole's list of drug salesmen] would certainly have reason enough to kill him.

SMITH: Yeah, I admitted, my name is probably in it.

STEARNS: And certainly you, . . . you know , let . . . let's face it, you're a person who dealt with Ron Cole, and you're a person who owed him a lot of money. And if you for one minute sat down in a room here, after [our] explaining exactly what our job was and what we were doing, if you for one minute didn't picture yourself as a suspect then, okay, then I would certainly foresee that if you've reached that point in your mind now, you're . . . we have no choice but to say well, he's . . . he's told us everything about what the suspect should look like, and we're sitting here saying, well you're right, we think that's probably what the suspect looks like too.

SMITH: Yeah.

STEARNS: Okay. And if you for one minute think that we don't think the suspect is someone who is friends with him, someone who dealt with dope and someone who was in debt to him, then absolutely, you're correct.

SMITH: Sure.

STEARNS: And we have no choice but . . . but to eliminate suspects right? I mean, that's our job.

SMITH: That's fine.

STEARNS: Okay. And that's where we're coming from.

SMITH: I know, but I'm saying there's probably a . . . at least a dozen people like me that have known him for years and in the same position. They owe him money. They're friends, and in the same position as I am.

STEARNS: And I don't, you know, I don't for one minute at all, okay, want to interrupt your . . . your train of thought or your needs or your necessities, okay, and we talked about the rights sheet, you're aware of them; been advised of your rights at least twice today, okay.

SMITH: Yes.

STEARNS: And you signed it and you're aware . . . and you're aware that it says on there any time you feel that you want counsel, that's it, okay. So, don't misunderstand [Trooper Miller] and I. You want counsel, well, by God, don't . . . don't hesitate to get yourself counsel. You want to talk to us about Ron Cole's dealings, you want to talk to us about the murder and suspects, anybody, we'll talk to you. If you want a lawyer to do that, then

feel free. [1] Okay. I don't think . . . I don't think . . . .

SMITH: I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know.

MILLER: All right. Well, you . . . you heard what . . . you heard what I said. I . . . you yourself say anybody that would be in that notebook could be . . . could be a logical suspect, and you certainly agree, at least with our line of reasoning, in picturing the kind of person we have as a suspect, an associate, somebody that dealt dope and somebody that's in the notebook and in debt up to his ass.

SMITH: Um'hum.

MILLER: Now, Mike, you've sat here for the last hour or so and we've . . . we've talked about your background; you've been pretty open and honest, at least [from] what we know about you, okay.

SMITH: Um'hum.

MILLER: Ah, in regards with your dealings with Ron . . . .

---

[1] At this moment, Stearns gestured to a nearby telephone and indicated it was available to Smith if he wanted to call an attorney.

Smith continued to engage in conversation with the officers. A short time later, Smith confessed that he had murdered the Coles.

C. *Pre-trial Proceedings*

Smith moved to suppress his confession, arguing that the police had ignored his request for an attorney. The state responded that Smith's statements had not constituted an unambiguous request for a lawyer.

The state judge who heard Smith's motion to suppress found that the police had been "forthright, polite, [and] professional" with Smith, and that their treatment of Smith "border[ed] on the solicitous." The judge also found that Smith had been totally aware of his rights both to remain silent and to invoke the assistance of counsel. The judge then found:

> THE COURT: Although it is true that [Smith] discusses with the police, and in a sense with himself, the fact that he may want an attorney, it is clear from the context of the discussion, and the remarks themselves, that he is simply -- those remarks amount to a person underscoring the fact that he has a right to counsel and he knows that he has a right to counsel. He's undecided whether he needs one, and elects to go forward. So, I adopt the state's position as to those remarks.

> I do not find them anywhere nearly approaching the unequivocal statement or the confused suggestion of a person who doesn't know any better that he ought to have counsel. I think the police acted totally properly in going ahead with the interview and allowing [Smith] to continue to discuss it with them.

D. *Appeals in the Alaska Courts*

Smith was convicted of two counts of first-degree murder, and he appealed to the Alaska court of appeals. The Alaska court of appeals affirmed the trial judge's ruling on the suppression issue: the court agreed with the trial judge's finding that Smith had never invoked his right to an attorney, but had chosen instead to continue the interview.

The supreme court of Alaska declined to review the decision of the court of appeals.

E. *Federal District Court Proceedings*

Smith filed a habeas corpus action in U.S. District Court for the District of Alaska. The magistrate to whom the case was assigned concluded that Smith was not entitled to relief. He found Smith's first reference to an attorney to be conditional and ambiguous in the context of the dialogue between Smith and the police.

He also found that none of Smith's statements constituted an invocation of the right to counsel.

Even though the magistrate rejected the State of Alaska's claim that the presumption of correctness set forth in 28 U.S.C. §2254(d) applied to the state trial judge's finding that Smith had not attempted to invoke his right to counsel, the magistrate nevertheless concluded, based on his independent review of the record, that the police had acted properly when they addressed and attempted to clarify the ambiguity in Smith's remarks.

The magistrate found that Smith had never unambiguously requested counsel -- either unconditionally or conditionally (if he was a suspect). And the magistrate specifically found that the police had adhered to the rule adopted by the Ninth Circuit in *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985), after remand, 833 F.2d 1284 (1987), *cert. denied*, 486 U.S. 1017 (1988).

In *Fouche*, the Ninth Circuit declared that when a suspect makes an ambiguous statement that might reasonably be interpreted as an invocation of his right to counsel, the police must thereafter limit their questions to attempts to clarify the suspect's intention and must obtain a clear indication that the suspect wishes to continue the interview without counsel before they return to substantive questioning. The magistrate in Smith's case found that the officers' explanations to Smith of why they felt he was a suspect in the murders were an appropriate response to the inquiries Smith had made; these explanations did not constitute "interrogation".

District Judge Russell Holland adopted the magistrate's findings and recommendation. The judge stated he was satisfied that Smith had not invoked his right to counsel, so the later questioning that elicited Smith's confession had been proper.

F. *The Ninth Circuit Opinion*

The Ninth Circuit reversed the district court in a split decision. The majority held that Smith's initial request for counsel was neither equivocal nor ambiguous. Rather, the majority viewed Smith's statements as a declaration that he wanted an attorney if he was a suspect in the murders. Thus, the majority held, the police should have stopped talking to Smith, since they knew Smith was a suspect. The majority rejected the State of Alaska's argument that the state court's contrary interpretation of Smith's intention or meaning was a finding of fact, entitled to the presumption of correctness. 860 F.2d at 1532, n.3. Alternatively, the majority said, even if Smith's remarks might be viewed as ambiguous, the police should have responded to Smith's inquiries by simply telling Smith he was a suspect, rather than by explaining to Smith why they viewed him as a suspect. *Smith v. Endell*, 860 F.2d 1528, 1531 (9th Cir. 1988).

Judge O'Scannlain, writing in dissent, concluded that Smith had not invoked his right to counsel. He pointed out that, while Smith told the police he was

interested in talking with a lawyer if the police were looking at him as a suspect, the focus of the *Miranda-Edwards* rule is on the intention of the suspect, not on the focus or strength of the suspicions in the minds of the police conducting the questioning. *Smith*, 860 F.2d at 1536 & n.5, citing *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 2101 (1988).

Moreover, Judge O'Scannlain concluded that the troopers' answer when Smith first asked if he was a suspect (that it wouldn't be fair for them to tell Smith he was not a suspect) was a comprehensible response to Smith's question, and that the remainder of the remarks made by the police were also responsive to Smith's inquiries. Thus, the police did not violate the *Fouche* rule, and the police properly continued the interview with Smith.

REASONS FOR GRANTING THE WRIT

A. *Federal Courts Should Observe the Presumption of Correctness in 28 U.S.C § 2254(d) When They Review a State Court's Finding that a Suspect Did Not Invoke His Right to Counsel.*

The Ninth Circuit believed that the question of Smith's intention when he made his remarks about an attorney was a legal question subject to independent review. *Smith*, 850 F.2d at 1532, n.3. Thus, the Ninth Circuit felt free to construe Smith's words as an invocation of his right to counsel despite a contrary finding by the state court trial judge and the Alaska court of appeals.

But 28 U.S.C. §2254(d) provides that a finding of fact made by a state court after a hearing on the merits of that factual issue shall be presumed correct in any federal habeas corpus action. The fact "that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact". *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Or, as Lord Bowen said in *Edgington v. Fitzmaurice*, "The state of a man's mind is as much a fact as the state of his digestion." Quoted in *United States Postal Service Bd. of Gov. v. Aikens*, 460 U.S. 711, 717 (1983).

This Court has recognized that a state court's findings regarding a person's knowledge, comprehension, or bias are entitled to the presumption of correctness.

Rushen v. Spain, 464 U.S. 114, 120 (1983) (per curiam) (state court's finding that a juror was not biased by an ex parte communication); *Maggio v. Fulford*, 462 U.S. 111 (1983) (per curiam) (state court's finding regarding a criminal defendant's competency to stand trial); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (state court's finding regarding a criminal defendant's understanding of the charge when he entered his guilty plea); and *Kuhlmann v. Wilson*, 477 U.S. 436, 459-460 (1986) (finding that statements made by the defendant to a jailhouse informant were spontaneous).

And in *Connecticut v. Barrett*, 479 U.S. 523, n.1 at ___, 107 S.Ct. 828, n.1 at 831 (1987), this Court suggested that, just as a trial court's determination of what a person said is a finding of fact, so also a trial court's determination of what the person meant by his words is equally a finding of fact.

The state judge who denied Smith's suppression motion listened to the tape recording of the dialogue between Smith and the police. The judge also had knowledge of Smith's behavior and speech through significant dealings with Smith in the courtroom. The trial judge concluded that Smith's remarks had not been a request for counsel; rather, Smith had been thinking out loud about whether he needed to invoke his right to counsel, and he had ultimately decided to proceed with the interview.

The trial judge's interpretation of Smith's remarks -- and of Smith's intention when he uttered these remarks -- is supported by substantial evidence.

In the early portions of the interview, the police pointedly asked Smith if he had shot Ron and Darcell Cole; and while Smith at first denied the killings, he admitted that anyone who owed Ron Cole money (as Smith did) would have a motive to kill him. From these exchanges in the early part of the interview, Smith must have known that the police viewed him as a suspect. Bearing this in mind, it was reasonable for the trial judge to conclude that, when Smith asked his later question about whether he was a suspect, he was not attempting to invoke his right to counsel but rather was attempting to stall for time or to fish for information the police had concerning his guilt.

Whether Smith intended to invoke his right to counsel when he made his remarks to the police is a question of fact. The trial judge resolved that factual issue against Smith and in favor of the State of Alaska. Under the presumption of correctness created by 28 U.S.C. § 2254(d), the Ninth Circuit was not free to disregard the state trial judge's finding. Instead, the Ninth Circuit was bound to honor the trial judge's finding (unless it lacked any fair evidentiary support). Since the state trial judge's finding had evidentiary support, it should have been controlling.

In a closely related area of *Miranda* jurisprudence -- the question of whether a suspect waived his rights in the first place -- the federal circuits are split regarding the proper application of § 2254(d)'s presumption of correctness.

The Ninth Circuit and the Third Circuit treat the voluntariness of a *Miranda* waiver as a mixed question of law and fact which they can review independently, giving no deference to the findings of the state court. *Terranova v. Kincheloe*, 852 F.2d 424 (9th Cir. 1988), and *Ahmad v. Redman*, 782 F.2d 409, 413 (3rd. Cir.), *cert. denied*, 479 U.S. 831 (1986). Both of these circuits afford the presumption of correctness to findings of what they characterize as "historical" fact; see, *e.g.*, *Norman v. Ducharme*, 871 F.2d 1483 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 1483 (1990), applying the presumption to a state court's finding that the accused did not in fact make a request for counsel. But the two Circuits refuse to extend the presumption to state court findings regarding the petitioner's state of mind.

On the other hand, the Fourth and Seventh Circuits view a finding of the voluntariness of a *Miranda* waiver as a factual determination, and so they apply the §2254(d) presumption of correctness. *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217, 219 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); and *Murphy v. Holland*, 776 F.2d 470, 482 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986), *on remand* 845 F.2d 83 (4th Cir. 1988). Under *Bryan* and *Murray*, the Alaska trial judge's finding that Smith had not intended to invoke his right to counsel would be afforded the presumption of correctness.

In *Miller v. Fenton*, 474 U.S. 104 (1985), this Court expressly left undecided the question of whether § 2254(d)'s presumption of correctness should apply to

a state court's finding that a suspect waived his *Miranda* rights. n.3, 474 U.S. at 108. This Court should now resolve this disparate treatment of state court findings of fact in favor of § 2254(d)'s presumption of correctness.

The failure to apply the presumption of correctness in habeas corpus actions brought by state prisoners is particularly troublesome because many federal circuits -- including the Ninth Circuit -- treat the voluntariness of a *Miranda* waiver as a factual issue when they are exercising their power of direct review in federal criminal cases. See *United States v. Doe*, 819 F.2d 206, 208-209 (9th Cir. 1987); *United States v. Ingram*, 839 F.2d 1327, 1329 (8th Cir. 1988); *United States v. Hawkins*, 823 F.2d 1020, 1022 (7th Cir. 1987); and *United States v. Ricks*, 817 F.2d 692, 697 (11th Cir. 1987).

Congress's enactment of 28 U.S.C. § 2254(d) is a declaration that findings of fact made by state court judges should normally be accorded the same deference as findings made by federal trial judges. This Court should recognize and support this policy by reversing the Ninth Circuit in this case.

B. *Even if the Ninth Circuit Was Entitled to Independently Re-Determine the Question of Smith's Intention, the Ninth Circuit Misapplied the Rule of Smith vs. Illinois When it Held that the Alaska Courts and the Federal District Court Could Not Rely on Smith's Entire Utterance to Determine His Intention.*

Even assuming that the Ninth Circuit was not bound by 28 U.S.C. § 2254(d) to extend a presumption of correctness to the Alaska courts' finding that Smith had not invoked his right to counsel, the Ninth Circuit majority was still wrong when it declared Smith's statements to be an unambiguous invocation of the right to counsel. The relevant portion of the interview is:

> STEARNS: Okay, so [you're not saying] things went bad and you had to protect yourself? That's out of the question? You didn't have anything to do with his death.
>
> SMITH: Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?
>
> MILLER: Well, it . . . it wouldn't be fair to you to say we weren't, Mike.
>
> STEARNS: Yeah.

> SMITH: Because if you are, it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.

If Smith had simply uttered, "Can I talk to a lawyer?", the Ninth Circuit might have been justified in concluding that Smith had unequivocally asserted his right to counsel. But Smith immediately followed up his initial question with a statement indicating that he was merely considering whether to invoke his right to counsel. Then, again unprompted, Smith immediately asked a second question, this one seeking information: Smith's second question was a request for the troopers to inform him where they were "coming from", and whether they viewed him as a suspect.

Thus, before the police made any further comment [which would have violated the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981)], Smith re-initiated his discussion with the officers by posing another question to them. The officers replied as follows:

> MILLER: Well, Mike, you yourself pointed out that . . . that anybody that might be found in that notebook [Ron Cole's list of drug salesmen] would certainly have reason enough to kill him.
>
> SMITH: Yeah, I admitted, my name is probably in it.

STEARNS: And certainly you, . . . you know , let . . . let's face it -- you're a person who dealt with Ron Cole, and you're a person who owed him a lot of money. And if you for one minute sat down in a room here, after [our] explaining exactly what our job was and what we were doing, if you for one minute didn't picture yourself as a suspect then, okay, then I would certainly foresee that if you've reached that point in your mind now, you're . . . we have no choice but to say well, he's . . . he's told us everything about what the suspect should look like, and we're sitting here saying, well you're right, we think that's probably what the suspect looks like too.

SMITH: Yeah.

STEARNS: Okay. And if you for one minute think that we don't think the suspect is someone who is friends with him, someone who dealt with dope and someone who was in debt to him, then absolutely, you're correct.

SMITH: Sure.

STEARNS: And we have no choice but . . . but to eliminate suspects right? I mean, that's our job.

SMITH: That's fine.

STEARNS: Okay. And that's where we're coming from.

At the close of this exchange, Smith clearly knew that the police considered him a suspect in the murders. The police had told him the reasons they suspected him, and they had refrained from asking Smith any further questions about the crime. If Smith had wished to invoke his right to counsel and terminate the interview, all that Smith had to do at this point was tell the police, "Then I want a lawyer."

But Smith did not do this. Instead, he tried to argue the police out of their suspicions:

> SMITH: I know, but I'm saying there's probably a . . . at least a dozen people like me that have known [Ron Cole] for years and [are] in the same position. They owe him money. They're friends, and in the same position as I am.

Sgt. Stearns's immediate response was to remind Smith of his *Miranda* rights, and particularly Smith's right to contact an attorney, before Smith went any farther:

> STEARNS: And I don't, you know, I don't for one minute at all, okay, want to interrupt your . . . your train of thought or your needs or your necessities, okay, and we talked about the rights sheet, you're aware of them; been advised of your rights at least twice today, okay.
>
> SMITH: Yes.
>
> STEARNS: And you signed it and you're aware . . . and you're aware that it says on

> there any time you feel that you want counsel, that's it, okay. So, don't misunderstand [Trooper Miller] and I. You want counsel, well, by God, don't . . . don't hesitate to get yourself counsel. You want to talk to us about Ron Cole's dealings, you want to talk to us about the murder and suspects, anybody, we'll talk to you. If you want a lawyer to do that, then feel free [gesturing toward the telephone]. Okay. I don't think . . . I don't think . . . .
>
> SMITH: I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know.

Smith then proceeded with the interview.

In *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 832 (1987), this Court stated that a request for counsel should be considered ambiguous if "the defendant's words, understood as ordinary people would understand them, are ambiguous." Here, Smith's words were ambiguous or equivocal. He thought he might want to invoke his right to counsel, but he wanted to hear more from the police before making that decision. After the police gave Smith an honest answer to his question and reminded Smith of his rights, Smith chose to continue the interview.

The Ninth Circuit majority, relying upon this Court's decision in *Smith v. Illinois*, 469 U.S. 91 (1984),

declared that nothing Smith said after he uttered the words, "Can I talk to a lawyer?" could be considered in determining Smith's intention. But the Ninth Circuit misread *Smith*.

In *Smith*, this Court confronted a case in which a suspect had apparently invoked his right to counsel, but then, upon further questioning by the police, the suspect had made additional statements that cast doubt on his intention to stop the interview until he had consulted an attorney. Establishing a corollary to the rule announced in *Edwards v. Arizona*, this Court held that once a suspect has unambiguously announced his desire to speak with an attorney, and the police (in violation of the *Edwards* rule) continue their questioning, the government cannot rely on the suspect's later statements to try to prove that his first utterance did not reflect his true intention.

But in the present case Smith did not have his thoughts or speech interrupted by further police questioning in violation of *Edwards*. Instead, after asking, "Can I speak to a lawyer?", Smith immediately made another statement, "At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer." And then, again uninterrupted, Smith immediately asked another question which invited the police to resume the conversation: "Are you looking at me as a suspect?"

The Alaska courts and the federal district court relied upon Smith's entire utterance -- the first question, the statement, and the second question -- in determining

that Smith had made no unequivocal request to stop the interview. This was proper under *Smith v. Illinois*. The *Smith* decision expressly exempts from its holding:

> ambiguities or equivocations that either (1) precede an accused's purported request for counsel, or (2) are part of the request itself.

469 U.S. at 96.

Smith's three sentences were part of a single, uninterrupted utterance. Smith's second and third sentences, which modified the thought expressed in his first sentence, were thus "part of the request itself". For this reason, the Alaska state courts and the federal district court could properly rely upon Smith's second and third sentences when they rejected Smith's claim that he had unequivocally invoked his right to counsel.

The Ninth Circuit committed error when it interpreted *Smith v. Illinois* to preclude consideration of Smith's entire utterance. The Alaska courts and the federal district court were entitled to rely on all three portions of Smith's utterance when deciding whether Smith had unequivocally invoked his right to counsel.

C. *The Ninth Circuit Should Have Found that the Police Officers Responded Properly to Smith's Ambiguous Statements.*

The Ninth Circuit has adopted a rule that, when police are confronted with statements that might be an invocation of the right to counsel, the police should limit themselves to questions designed to clarify the suspect's intention. *United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985), *after remand*, 833 F.2d 1284 (1987), *cert. denied*, 486 U.S. 1017 (1988).

The Ninth Circuit majority in Smith's case decided that the state troopers' response to Smith's questions had gone beyond the *Fouche* rule. But Smith's case is factually distinct because he did not simply make an ambiguous statement about an attorney. The last portion of his utterance was another question posed to the police -- asking whether they considered him a suspect. The police answered honestly, telling Smith that, given what they knew about him and about the crime, they had to consider Smith a suspect.

When Smith responded to this information by trying to re-initiate a discussion about the facts of the case, Sgt. Stearns interrupted Smith and reminded him of his right to stop the interview and speak to an attorney before saying anything else.

These were not the actions of police officers intent on coercing or tricking Smith into continuing the interview. Rather, as the state trial judge found, the officers' conduct "bordered on the solicitous". The police

did not engage in the sort of interrogation-disguised-as-statements condemned by this Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980). If the conduct of the police in this case violates the rule announced by the Ninth Circuit in *Fouche*, then this Court should modify *Fouche*.

In the present case, by statements and questions that did not infringe upon Smith's absolute right of free choice, the state troopers were able to clarify that Smith wished to continue the interview and did not wish to invoke his right to counsel. It is unreasonable, and poor policy, to suppress Smith's ensuing confession. A voluntary confession is a valuable and reliable type of evidence. The social price of excluding this evidence is high; the exclusionary rule should not be applied when *Miranda*'s prophylactic rule has not been violated. *See Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (when admissions are not coerced, little justification exists for permitting a probative confession to be irretrievably lost to the fact-finder).

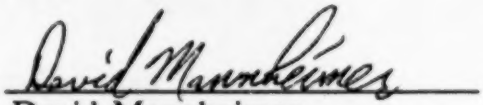
This Court has not yet provided guidance to police on how to respond to ambiguous statements that might be requests for counsel. (In *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 832 n.3 (1987), and in *Smith v. Illinois*, 469 U.S. 91, 96 n.3 (1984) (per curiam), the Court held that the accused's statements were not ambiguous, thus mooting the question of the proper police response to an ambiguous statement.) Smith's case presents an opportunity for this Court to define the contours of proper police responses to a suspect's ambiguous statements.

CONCLUSION

For these reasons, this Court should issue a writ of certiorari to review the decision of the Ninth Circuit.

Respectfully submitted this 29th day of August, 1990.

DOUGLAS B. BAILY
ATTORNEY GENERAL,
STATE OF ALASKA

By: 
David Mannheimer
Assistant Attorney General

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Michael T. Smith
Petitioner-Appellant,
v.
Roger V. ENDELL, Commissioner of the Department of Corrections, State of Alaska, Respondent-Appellee.
No. 86-4357
United States Court of Appeals,
Ninth Circuit
Argued and Submitted Feb. 1, 1988.
Decided Nov. 14, 1988.

Defendant convicted of murder petitioned for writ of habeas corpus. The United States District Court for the District of Alaska, H. Russell Holland, J., dismissed petition, and appeal was taken. The Court of Appeals, James R. Browning, Circuit Judge, held that murder defendant's request for counsel, conditioned upon whether interrogating officers considered him to be a suspect, was unambiguous and thus officers, who considered defendant to be a suspect, should have ceased interrogating him until attorney was present.

Reversed.

O'Scannlain, Circuit Judge, dissented and filed opinion.

Peggy A. Roston, Bankston, McCollum & Fossey, Anchorage, Alaska, for petitioner-appellant.

W. H. Hawley, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, Alaska, for respondent-appellee.

Appeal from the United States District Court for

the District of Alaska.

Before BROWNING, NORRIS and O'SCANNLAIN, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

Smith was convicted in the Superior Court of the State of Alaska for the murder of Ron and Darcelle Cole. He appealed to the Alaska Court of Appeals asserting, among other claims, that the Superior Court failed, in violation of rules established in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), to suppress a confession obtained in the absence of counsel through in-custody, police-initiated interrogation after Smith had requested an attorney. The Alaska Court of Appeals affirmed; the Supreme Court of Alaska denied review. The United States District Court for the District of Alaska dismissed Smith's petition for habeas corpus. This appeal followed.

I

[1] The governing law is clear. Under *Miranda* a person in custody must be informed prior to interrogation that he has a right to remain silent and to have a lawyer present. *Miranda v. Arizona*, 384 U.S. at 479, 86 S.Ct. at 1630. If he requests counsel, interrogation must cease until an attorney is available. *Id.* it 474, 86 S.Ct. at 1628. Not only must all questioning stop when a suspect expresses his desire for counsel, but questioning can be resumed without a lawyer only if the suspect

himself initiates further communication -- waiver cannot be found from a suspect's continued response to questions, even if he is again advised of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378 (1981).

[2-4] Requests for counsel are to be given broad effect even when less than all-inclusive. *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987). A suspect's responses to further questioning cannot be used to cast doubt upon the adequacy of his initial request. *Smith v. Illinois*, 469 U.S. 91, 97-99, 105 S.Ct. 490, 493-94, 83 L.Ed.2d 488 (1984) (per curiam). When the initial request is ambiguous or equivocal, all questioning must cease, except inquiry strictly limited to clarifying the request. *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir. 1985), *after remand*, 833 F.2d 1284, 1287 (1987); *United States v. Nordling*, 804 F.2d 1466, 1470 (9th Cir. 1986).

The facts are undisputed. Smith was arrested for possession of cocaine and questioned by state troopers. The troopers advised Smith of his *Miranda* rights. Smith waived them. He discussed the drug charges with the troopers for approximately an hour, admitting he had been distributing cocaine, Ron Cole was his supplier, he owed Cole $15,000, and Cole maintained a list of persons who owed him for cocaine, one of whom was Smith. The trooper asked Smith if he shot Cole. Smith denied it. The trooper pressed the point. Smith's initial request for counsel followed:

> Smith: Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?
>
> Trooper: Well, it . . . it wouldn't be fair to you to say that we weren't Mike.
>
> 2nd Trooper: Yeah.
>
> Smith: Because if you are, it's . . . it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.

The troopers reminded Smith he himself had pointed out that anyone in Cole's list of debtors who owed him money for drugs "would certainly have reason enough to kill him," to which Smith responded, "Yeah. I admitted my name is probably in it." The troopers then said:

> [L]et's face it, you're a person who dealt with Ron Cole, and you're a person who owed him a lot of money.

The troopers added that if Smith still did not regard himself as a suspect:

> [W]e have no choice but to say well,

> he's . . . he's told us everything about what the suspect should look like, and we're sitting here saying, well you're . . . you're right, we think that's probably what the suspect looks like too.

Smith responded, "Yeah," after which the trooper again repeated the evidence against Smith:

> Okay. And if you for one minute you think that we don't think the suspect is someone who is friends with him, someone who dealt with dope and someone who was in debt to him, then absolutely, you're correct.

Smith reacted by pointing out that others were equally suspect:

> I know, but I'm saying there's probably a . . . at least a dozen people like me that have known him for years and in the same position. They owe him money. They're friends [ ] in the same position as I am.

The troopers responded by reminding Smith he had been advised of his right to counsel and if he wanted counsel he should not hesitate to get one, but if "[y]ou want to talk to us about Ron Cole's dealings, you want to talk about the murder and suspects, anybody, will talk with you."

Smith then made his second statement regarding representation by counsel, saying: "I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know."

A trooper responded with still another recitation of the circumstances connecting Smith with the murder:

> Alright . . . Well, you . . . you heard what . . . you heard what I said. I . . . you yourself say anybody that would be in that notebook could be . . . could be logical suspect, and you certainly agree, at least with our line of reasoning, in picturing the kind of person we have as a suspect, an associate, somebody that dealt dope and somebody that's in [the] notebook and in debt up to his ass.

This part of the interview concluded:

> SMITH: Um'hum.
>
> TROOPER: Now, Mike, you've sit here for the last hour or so and we've . . . we've talked about your background; you've been pretty open and honest at least what we know about you, okay.
>
> SMITH: Um'hum.
>
> TROOPER: Ah, in regards with your

dealings with Ron . . .

At this point, the troopers shut off the tape recorder for approximately twenty-one minutes to "get some coffee." While the tape was off, Smith confessed to the murders. The troopers then turned the recorder back on, and Smith repeated his confession.

The Superior Court denied Smith's motion to suppress, holding that in his two references to a lawyer Smith was merely "underscoring the fact that he has a right to counsel . . . . He's undecided whether he needs one and elects to go forward." The Alaska Court of Appeals affirmed, stating Smith's first reference to having an attorney "simply indicated Smith was aware that he had a right to counsel;" and his second reference "indicat[ed] he was trying to decide whether to contact an attorney, but continued with the interviews."

The United States Magistrate recommended denial of Smith's petition for habeas corpus. The magistrate recognized that *Smith v. Illinois* barred use of Smith's second reference to counsel to cast doubt upon his initial request, and said it was not clear whether in evaluating Smith's request for counsel the Alaska Courts had relied upon both statements. The magistrate characterized Smith's first statement as a conditional request for counsel. "A statement of conditional intent," the magistrate said, "is an ambiguous statement, at least in the context of this dialogue," thus bringing into play the doctrine that only questions designed to clarify whether the subject desires an attorney were permissible.

"Where a suspect's desires are expressed in an equivocal fashion," the magistrate continued, "it is permissible for the questioning officer to make further inquiry to clarify the suspect's wishes."

The magistrate characterized the troopers' response to Smith's initial request as consisting of "statements as to the focus of their investigation and then to Smith's right to counsel." The magistrate concluded, "Their statements did not embrace the form of further interrogation. Informing Smith of the available evidence against him in response to his question as to whether he was a suspect did not fall within the realm of interrogation."

The magistrate recognized that the investigators "might have focused more directly on Smith's equivocations as to whether he sought to invoke his right to counsel. However, their brief continuation of their discussion of the type of person they considered as a suspect was not error of constitutional dimension," and "did not exceed the permissible boundary of the 'equivocalness exception.'" In a Supplemental Report, the magistrate reiterated that the investigators "did not act improperly by addressing the ambiguity of whether or not Smith was a suspect as well as reminding Smith of the previous advisement of rights that he received from the Investigator since this questioning was directed toward clarifying Smith's desire for counsel."

The district court stated it had reviewed the magistrate's report, was "satisfied that Petitioner's con-

stitutional right to counsel was not effectively invoked, and therefore the questioning which preceded and led to his confession was permissible." The court adopted the magistrate's recommendation and dismissed the petition.

II

We believe the magistrate's analysis underlying the district court's order was flawed in two critical respects. First, Smith's initial request for counsel was not equivocal or ambiguous. It was conditional, but the investigators knew the condition to be satisfied. Communication with Smith with respect to the matter under investigation therefore should have ceased until an attorney was present. Second, even if Smith's initial request was unclear, the interrogator's response was inappropriate because it was not designed to clarify the request. On either hypothesis, the confession must be suppressed.

A

Smith's initial request was clear enough: if the troopers regarded him as a suspect in the murder of Ron and Darcelle Cole, he wanted an attorney. The request was not ambiguous; Smith was uncertain whether the troopers considered him a suspect, but if they did, his intent was clear: "I should talk to a lawyer." In this respect his statement was not equivocal; there was no

"might" or "maybe" or "perhaps."[1]

[5] We agree with the magistrate that Smith's request was conditional; it was not to be operative unless the troopers suspected Smith of the murders; if they did, however, Smith wanted counsel. The troopers could not have mistaken Smith's meaning.[2] Since they knew him to be a suspect, questioning should have stopped until an attorney was present, unless Smith himself initiated its renewal.

Smith's repetition of his inquiry as to whether he was a suspect by asking the troopers "where you're coming from" was not an initiation of a new exchange. The question was a continuation of a dialogue that had not been terminated. *See Christopher v. Florida*, 824 F.2d 836, 845 (11th Cir. 1987).[3]

It is also irrelevant that Smith was advised of his right to counsel both before and after he asked for an attorney or that the interrogation was conducted without coercion. *See Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093, 2100, 100 L.Ed.2d 704 (1988); *Smith v. Illinois*, 469 U.S. at 99 n.8, 105 S.Ct. at 495, n.8; *Edwards v. Arizona*, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. The Supreme Court has repeatedly emphasized that the *Edwards* rule is a "rigid," "bright line," "per se" rule.[4] The conduct it prohibits is not wrongful in itself. The purpose of the rule is wholly prophylactic: "By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion." *Barrett*, 107 S.Ct. at 832.[5]

B

[6] Even if Smith's request were regarded as in some way ambiguous or equivocal, the troopers did not respond by limiting their inquiry to clarifying Smith's desire for counsel. They did not give Smith a direct answer to the simple question he asked: whether he was a suspect. Instead they used his question as an occasion for repeatedly cataloguing the evidence connecting him with the murders.

The resulting drawn-out dialogue was wholly unnecessary to the only proper purpose of further questioning: the clarification of Smith's initial statement that if he was a suspect he wanted counsel. Smith asked only *whether* he was a suspect, not *why* he was a suspect. The repeated recitations of the circumstances tying Smith to the murders did nothing to clarify Smith's desire for counsel. It was a powerful -- though subtle -- inducement for him to confess. *See United States v. Johnson*, 812 F.2d 1329, 1331 (11th Cir. 1986).

The prophylactic rule established in *Miranda* and *Edwards* was intended to preclude precisely the kind of technique employed by the troopers in this case to induce Smith to forego his initially expressed desire for counsel and incriminate himself. Questioning after an ambiguous or equivocal request for counsel "is to be limited to . . . clarification and cannot be used as a means of eliciting any incriminating statements from the

suspect relating to the subject matter of the interrogation." *United States v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984) (citation omitted); *Fouche*, 776 F.2d at 1405. As the Supreme Court said in *Smith v. Illinois*: "In the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching' -- explicit or subtle, deliberate or unintentional -- might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." 469 U.S. at 98, 105 S.Ct. at 494 (citations omitted).

The State concedes that an equivocal request for counsel permits the police only to ask the suspect questions that seek to clarify and precludes the police from supplying information to a suspect as a strategy to elicit incriminating statements. The State argues, however, that this rule does not apply when the suspect asks whether he is a suspect and appears to desire this information to assist him in deciding whether to invoke his right to counsel.[7] As we have noted, however, "Questions aimed at clarifying the desire for counsel must be strictly limited to that purpose." *Fouche*, 776 F.2d at 1405. The proper response in this case was simply to inform Smith he was a suspect.[8] Certainly nothing more was required to "clarify" the request, and therefore nothing more was allowed under *Edwards* and *Fouche*.

Although agreeing that Smith's request was conditional and the condition had been satisfied, the

magistrate upheld the continuing dialogue between the troopers and Smith, on the ground the exchange was not "interrogation."[9] The *Edwards* prophylactic rule applies to the initiation of any "communication, exchanges, or conversations." 451 U.S. at 485, 101 S.Ct. at 1885, *see also Bradshaw*, 462 U.S. at 1044-45, 103 S.Ct. at 2834-35. The police "may not ask questions or make statements which 'open up a more generalized discussion relating directly or indirectly to the investigation,' as this constitutes interrogation." *Christopher v. Florida*, 824 F.2d 836, 845 (11th Cir. 1987) (quoting *Bradshaw*, 462 U.S. at 1045, 103 S.Ct. at 2835).

The State argues that Smith's post-request "failure to respond to the [troopers'] offer to use the telephone together with the fact that he resumed answering questions adequately clarified Smith's position." Acceptance of this argument would defeat the requirement that post-request interrogation be limited to clarification of the initial request, and that waiver may not be based upon a suspect's response to continued interrogation. *See also United States v. Ledezma-Hernandez*, 729 F.2d 310, 312 (5th Cir. 1984).

Because this requirement was violated, the statement obtained from Smith should have been suppressed.

REVERSED.

O'SCANNLAIN, Circuit Judge, dissenting:

As I read the record in this case, defendant Smith never invoked his right to counsel after having been given unrestricted opportunity to do so. At most

he was "thinking out loud" while making up his mind in a clearly non-coercive situation. In the *Miranda-Edwards-Fouche I-Fouche II* context, I would summarize the record as comprising an initial *Miranda* waiver as the interrogation begins, a later ambiguous request for counsel followed by clarifying questions, after which it becomes clear that defendant never did invoke his right to counsel. Therefore, I must dissent from the majority's decision to require suppression of the confession. I would concur in the four preceding court decisions (two Alaska state courts, a federal magistrate, and a federal district judge), which found no constitutional bar to the admissibility of Smith's confession.

The key issue is, of course, whether Smith's statements were sufficient, as a matter of constitutional law, to invoke his right to counsel. If Smith had stopped after "Can I talk to a lawyer?," he would have invoked unambiguously his fifth and fourteenth amendment rights and no doubt the Alaska troopers, following *Miranda* and *Edwards*, would have answered affirmatively and shown him the telephone as indeed they did in this case. In any event, "can I talk to a lawyer?" standing alone, would have been an unambiguous request for counsel.

The problem is that Smith did *not* stop there. He went on to say, without interruption, that he was only interested in talking to a lawyer if the police were looking at him as a suspect, whereupon he asked the question, "Are you looking at me as a suspect?" Although the majority feels otherwise, I find the trooper's

answer to that question to be responsive and comprehensible: "Well, it . . . it wouldn't be fair to you to say that we weren't Mike." Of course Smith was a murder suspect and Trooper Stearns told him so.

The troopers then began to *clarify* whether Smith, having received confirmation he was indeed a suspect, wanted to go on to invoke his right to counsel, as the following excerpt from the interrogation transcript makes clear.

> STEARNS: And you signed [the rights sheet] and you're aware . . . and you're aware that it says on there any time you feel that you want counsel, that's it, okay. So, don't misunderstand Chuck and I. You want counsel, well . . . by God don't . . . don't hesitate to get yourself counsel. You want to talk to us about Ron Cole's dealings, you want to talk to us about the murder and suspects, anybody, will [sic] talk to you. If you want a lawyer to do that, then feel free [gesturing to a nearby telephone].

These police statements were well within the clarification process because they were in response to Smith's own questions.[2] The majority attaches great significance to the troopers' explaining to Smith *why* he was a suspect, which it deems impermissible because it found a purpose to elicit incriminating statements in violation of the standard we established in *Fouche I*, 776

F.2d at 1405 ("Questions aimed at clarifying the desire for counsel must be strictly limited to that purpose; they may not be used to elicit incriminating information").[3] While the *Fouche I* standard is strict by its very terms, I do not believe it was intended to be used as a mechanism to pick apart every word that a police officer might utter during the course of an interrogation. Indeed, the actions of the troopers are at least as solicitous concerning the suspect's right to counsel, if not more so, as those of the FBI agent which we held to be proper in *Fouche II*. *See also United States v. Nordling*, 804 F.2d 1466, 1470-71 (9th Cir. 1986). Even the majority concedes that the interrogation was conducted without the slightest trace of coercion.[4] Majority opinion at 1531.

In the clarification process, it became obvious that Smith did not intend to invoke his right to an attorney. Having been offered the telephone to call his lawyer, Smith chose instead to renew the dialogue. Indeed, Smith stated shortly before his confession, and long after having been told he was a suspect: "I don't know if I need [an attorney] or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know."

Certainly, if Smith's initial statements had been unequivocal, then I would not look beyond them in determining that he had properly invoked his right to counsel. *Smith v. Illinois*, 469 U.S. at 92, 105 S.Ct. at 491. But Smith's initial statements do not rise to the level of an unambiguous request, and therefore the

Smith v. Illinois rule does not apply. *See Grooms v. Keeney*, 826 F.2d 883, 887 (9th Cir. 1987) (court stating that "[t]he *Smith* rule does not apply here, because it concerned an unequivocal request for counsel, and there is no persuasive reason to extend or invert its rule to fit the facts of this case") (citation omitted).

Smith's latter statements merely show that he had no intention of unambiguously invoking his right to counsel before continuing to answer questions. In *Fouche II*, we did not require in the clarification process that the suspect affirmatively state that he would continue without a lawyer present. Rather, simply enough, we evaluated whether Fouche invoked his right to counsel. *See Fouche II*, 833 F.2d at 1287 ("Fouche voluntarily declined to invoke his right to counsel, choosing instead to answer [the agent's] questions.").

Nothing in *Edwards* or its progeny mandates a reversal in this case. Smith made an ambiguous inquiry about right to counsel, to which the troopers responded properly by seeking to clarify Smith's true intentions. In so doing, the troopers did not stray from the limits we laid down in *Fouche I*. I am aware of no Supreme Court or Ninth Circuit precedent which freezes police in their tracks after the defendant says, "I'm trying to make my mind up" in this context. I am concerned that the majority's analysis unnecessarily complicates this area of the law. I fear that the majority's holding does not accomplish what in large measure it sets out to do, *i.e.*, provide a bright line for all concerned parties to follow.

In fact, I think it may likely have the opposite effect. The analysis essentially injects a new concept into the fifth-fourteenth amendment lexicon: "conditional unequivocal request for counsel." In so doing, it confuses and diverts attention from whether right to counsel has been invoked. It also carries with it a potentially thorny new analytical requirement, *i.e.*, whether a "condition" laid down by the suspect is satisfied.[5]

Even if my fears that the majority's "bright line" will become blurred are unjustified, I am concerned that it loses sight of the policy underlying that line. Until now, we have sought to maintain a delicate balance between ensuring that suspects are properly insulated against police overreaching while allowing the law enforcement community to perform its duties effectively.[7]

Perhaps the majority's new "bright line" is only an accretion from the old. But one only has to look back less than a decade to the facts of *Edwards* (which extended *Miranda*) and compare them to the present case to see how accretion becomes avulsion. The *Edwards* Court was presented with detectives who went to the jail where defendant was being held to badger him into talking after he had unequivocally invoked both his right to counsel and his right to remain silent; the Court quite properly drew a line beyond which the police could not go and required suppression of the confession. Here, we delegate to a knowledgeable defendant during a *Miranda*-waived interrogation at trooper headquarters the right to lay down to police the

conditions upon which his interrogation may or may not proceed. We have come a long way since *Miranda* and *Edwards* -- too far, too fast, in my view.

FOOTNOTES

1. We disagree with the dissent's view that "Smith's statements evince no more than an ambiguous or equivocal assertion of the right to counsel." Dissent at 1534 n.1. The dissent concedes, as it must, that Smith made clear he was "interested in talking to a lawyer if the police were looking at him as a suspect." *Id.* at 1534. It is difficult to regard Smith's statement as ambiguous and equivocal when the statement "I do want an attorney before it goes very much further" is not. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1041-42, 103 S.Ct. 2830, 2832-33, 77 L.Ed.2d 405 (1983) (plurality opinion).

2. If there were any doubt whether Smith invoked his right to counsel his request should have been broadly construed and the uncertainty resolved in favor of invocation of the right. *Barrett*, 107 S.Ct. at 832; *Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631 (1986); *Grooms v. Kenney*, 826 F.2d 883, 886 (9th Cir. 1987); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 122-23 (7th Cir. 1987); *Wilson v. Murray*, 806 F.2d 1232, 1235 (4th Cir. 1986); *McGee v. Housewright*, 689 F.2d 797, 801 (8th Cir. 1982).

Faced with an ambiguous or equivocal request, the "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Jackson*, 475 U.S. at

633, 106 S.Ct. at 1409. Doubts must be resolved in favor of protecting the constitutional claim." *Id.* It is only when this broad interpretation fails to clarify the request that further questioning directed solely toward resolving the ambiguity is permitted.

3. The State argues that we are required by 28 U.S.C. § 2254(d) to regard as presumptively correct the state court findings "that Smith was 'merely underscoring" the fact that he had a right to counsel, that he knew he had a right to counsel, and that he ultimately elected to go forward without counsel." As the district court concluded, the state court's characterization of Smith's words is hardly a finding of fact. There is no dispute that Smith knew he had a right to counsel, nor is there any factual dispute as to what happened. The constitutional effect of the dialogue is a legal question subject to our independent review. *Cf. Miller v. Fenton*, 474 U.S. 104, 112, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985); *United States v. Crespo de Llano*, 838 F.2d 1006, 1015 & n.2 (9th Cir. 1988); *Grooms v. Kenney*, 826 F.2d at 885.

Moreover, the superior court's conclusion that Smith ultimately elected to go forward without an attorney rested upon statements made by Smith as a result of continued interrogation following his initial request for counsel. But consideration of these subsequent statements is barred by *Smith v. Illinois*, 469 U.S. at 97-99, 105 S.Ct. at 493-95. As the Supreme Court explained, "Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. 'No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that

the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.'" *Id.* at 98-99, 105 S.Ct. at 494 (citation omitted).

Although in this case the magistrate was aware of the rule of *Smith v. Illinois*, he nonetheless relied upon Smith's later statement that he was uncertain whether he needed counsel to support the magistrate's conclusion that Smith did not sufficiently invoke the right to counsel. The dissent reflects the same error. Dissent at 1536 ("Smith's latter statements merely show that he had no intention of unambiguously invoking his right to counsel . . . .").

4. *See Arizona v. Roberson*, 108 S.Ct. at 2098; *Michigan v. Jackson*, 475 U.S. at 634, 106 S.Ct. at 1408; *Smith v. Illinois*, 469 U.S. at 98, 105 S.Ct. at 494; *Solem v. Stumes*, 465 U.S. 638, 646-48, 104 S.Ct. 1338, 1343-44, 79 L.Ed.2d 579 (1984); *Oregon v. Bradshaw*, 462 U.S. at 1044, 103 S.Ct. at 2834.

5. Contrary to the dissent, the holding in this case neither draws new lines nor creates new categories. *Cf.* Dissent at 1536-1537 & n.5. Rather, it declines to create an exception to *Miranda* and *Edwards* allowing police to ignore clear and unequivocal requests for counsel when the individual indicates his request need only be honored if the police consider him a suspect.

This approach presents no "potentially thorny new analytical requirement." Dissent at 1536. When an individual responds to interrogation by stating "if I am a suspect, I want counsel," and then asks "am I a suspect?"

police officers will readily recognize the correct response and its consequences.

6. *See supra* at 1529-1530.

7. The magistrate relied upon *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc), for the proposition that "[a]ll communication between a suspect and a law enforcement officer is not barred after the suspect invokes his right to counsel." However, *Rodriguez-Gastelum* was decided prior to *Edwards*, and, as the state concedes, was significantly undermined by *Edwards*. Appellee's brief at 28. *See United States v. Thierman*, 678 F.2d 1331, 1338 (9th Cir. 1982) (Wallace, J., dissenting). Our decision in *Fouche* makes clear that the only permissible communication following an equivocal request for counsel is that which is aimed at clarifying the request.

8. The State argues the *Fouche* rule requiring the police to clarify a suspect's intentions is inapplicable to this case because Smith's initial statement "was not an ambiguous or equivocal request for counsel and certainly not a request for immediate representation." We agree the request was conditional, but, as stated in Part IIA, we do not agree that the police may disregard the request when they know the condition has been satisfied.

9. The Magistrate cited *United States v. Davis*, 527 F.2d 1110 (9th Cir. 1975), in which a suspect who indicated he did not want to talk, was shown surveillance photographs taken at the bank during the robbery and asked if he wanted to reconsider. The case is distinguishable. In *Davis*, the suspect's right to silence rather

than the right to counsel was at issue, and "the right to silence is not protected by a *per se* rule." *Christopher v. Florida*, 824 F.2d at 844; *Michigan v. Mosley*, 423 U.S. 96, 104 n.10, 96 S.Ct. 321, 326 n.10, 46 L.Ed.2d 313 (1975). In any event, the single statement in *Davis* is in sharp contrast with the repeated recitation of incriminating circumstances to which Smith was exposed.

A possibly more analogous case is *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), where we held that the police officers did not have to "sit mute" during the transportation of a prisoner even after he had invoked his right to counsel. Our holding in *Pheaster* is seriously undermined by the Supreme Court's decision in *Edwards*. *See also Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (finding a violation of the right to counsel when police elicited incriminating information during ride to police station).

1. Smith's statements evince no more than an ambiguous or equivocal assertion of the right to counsel, *see United States v. Fouche*, 776 F.2d 1398 (9th Cir. 1985) ("*Fouche I*"), even when read in light of the Supreme Court's charge to construe broadly any such requests. *See e.g., Michigan v. Jackson*, 475 U.S. 625, 633, 106 S.Ct. 1404, 1409, 89 L.Ed.2d 631 (1986).

Moreover, the simple fact that the suspect has mentioned the word "lawyer" is not dispositive of whether he has made even an ambiguous request for counsel. *See United States v. Jardina*, 747 F.2d 945, 949 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1773, 84 L.Ed.2d 833 (1985) ("The word 'attorney' has no talismanic qualities. A defendant does not invoke his right

to counsel any time the word falls from his lips").

2. These statements also shed light on what we have referred to as the "critical factor" in determining the validity of the government's behavior; *i.e.*, "whether a review of the whole event discloses that the interviewing agent has impinged on the exercise of the suspect's continuing option to cut off the interview." *United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988) ("*Fouche II*") (quoting *Nash v. Estelle*, 597 F.2d 513, 518 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981, 100 S.Ct. 485, 62 L.Ed.2d 409 (1979)).

The majority seems to think that the clarification process should be limited to the police *answering* a suspect's questions. See majority opinion at 1533-1534. Such an approach is at odds, however, with the very wording of the standard we adopted in *Fouche I*, wherein we stated that "*[q]uestions* aimed at clarifying the desire for counsel must be strictly limited to that purpose." *Fouche I*. I found no constitutional requirement that a suspect and police reverse roles at this stage; the police are still in charge of the interrogation and are not barred from *asking* clarifying questions.

3. Indeed, the troopers' actions neither violate the *Fouche I* standard nor would they violate the necessarily stricter standard we apply in reviewing police conduct following a suspect's *unequivocal* request for counsel. A recent case is illustrative, in which we held that police did not violate *Miranda* when, after a suspect had unequivocally requested an attorney, they falsely told him that he had been positively identified by the victim of

the rape. *Shedelbower v. Estelle*, 859 F.2d 727 (9th Cir. 1988). One would be hard-pressed to argue that lying to a suspect about his implication in the crime about which he is being questioned is somehow more appropriate police conduct than that in which the troopers engaged here.

4. I am mindful of the Court's admonition that *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and its progeny provide for "a prophylactic safeguard *whose application* does not turn on whether coercion in fact was employed." *Smith v. Illinois*, 469 U.S. 91, 99 n.8, 105 S.Ct. 490, 495 n.8, 83 L.Ed.2d 488 (1984) (emphasis supplied). I am not questioning in this dissent *whether Edwards* should be applied; rather, I suggest that evaluating the underlying purposes of the *Edwards* rule offers guidance on *how* to apply the rule.

5. This is especially bothersome here, where the alleged condition relates to a matter within the exclusive knowledge of the interrogators. Where, as here, the answer is obvious, *i.e.*, the troopers were looking at Smith as a murder suspect (and so informed him), the problems are admittedly minimal. But what about a situation in which the suspect makes his request contingent upon a matter that is not readily apparent? Then will the focus of the inquiry have to shift to the state of mind of the interrogators to see if the alleged condition is satisfied?

Until now, right to counsel jurisprudence recognized two categories of request with a bright line rule to deal with each: "unequivocal" (all interrogation ceases until

accused initiates further communication: *Miranda-Edwards*) or "ambiguous-equivocal" (clarifying questions only: *Fouche I-Fouche II*). The majority sets up a new category of "conditional" somewhere between *Miranda* and *Fouche I*; I would place "conditional," if such a category were to exist at all, entirely within "ambiguous-equivocal."

First, a two category rule definitely offers a much more luminous "bright line" than does the majority. Second, such a standard actually serves to protect the suspect undergoing questioning better than does the majority approach because under the latter analysis, what happens to requests based on conditions that are not satisfied? Can they be treated as nullities? Again, the analysis will unravel into a thorny bramble in which the court will be called upon to determine whether the condition is satisfied. Third, the "strictly limited" standard set forth in our *Fouche I* decision guards against agents using responses to an allegedly conditional request for counsel as opportunities to obtain incriminating statements. Indeed, under the standard of conduct exhibited in this case, the interrogator would be required to do more than simply provide any knowledge he may have in regard to the "condition" the suspect has attached to his purported invocation; he should also give the suspect, having been made aware of any information the agent may have had, an additional and explicit opportunity to invoke the right to counsel (as the troopers did here). Finally, such a standard comports with the fact that "*Edwards* focuses on the state of mind of the suspect and not of the police." *Arizona v. Roberson*, ___ U.S. ___, 108 S.Ct. 2093, 2101, 100 L.Ed.2d 704 (1988). Indeed, as Justice Kennedy stated in his

Roberson dissent, "[o]ur ultimate concern in *Edwards*, and in the cases which follow it, is whether the suspect knows and understands his rights and is willing to waive them." *Roberson*, 108 S.Ct. at 2102.

6. I advisedly speak of maintaining a balance between these competing interests in this context. As Justice Kennedy reminds us in his dissent in *Roberson*, the *Edwards* rule is just that -- a rule -- and not a constitutional mandate. *Roberson*, 108 S.Ct. at 2101-02 (Kennedy, J., dissenting). Therefore, we must be careful in applying the rule in contexts that represent an "inching away" from the moorings of the original purposes for the rule.

7. The words of Justice Kennedy's dissent in *Roberson* seem particularly apt here as well: "The majority's rule is not necessary to protect the rights of suspects, and it will in many instances deprive our nationwide law enforcement network of a legitimate investigative technique now routinely used to resolve major crimes." *Roberson*, 108 S.Ct. at 2102 (Kennedy, J., dissenting).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL T. SMITH,	)	
	)	
Petitioner-Appellant,	)	
	)	No. 86-4357
v.	)	
	)	
ROGER V. ENDELL,	)	D.C. No. CV84-583-H
Commissioner of the	)	
Department of Corrections,	)	
State of Alaska,	)	ORDER
	)	
Respondent-Appellee.	)	
	)	

Before: BROWNING, NORRIS
and O'SCANNLAIN, Circuit Judges

Judges Browning and Norris vote to deny the petition for rehearing and reject the suggestion for rehearing en banc; Judge O'Scannlain votes to grant the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35).

The petition for rehearing is denied and the

suggestion for rehearing en banc is rejected.

Filed June 1, 1990, Cathy A. Catterson, Clerk, U.S. Court of Appeals.

THE COURT OF APPEALS

OF THE STATE OF ALASKA

MICHAEL T. SMITH,	)	
	)	
Appellant,	)	File No. 7093
	)	
v.	)	MEMORANDUM
	)	OPINION AND
STATE OF ALASKA,	)	JUDGMENT
	)	
Appellee.	)	[No. 641 - July 25, 1984]
	)	

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, J. Justin Ripley, Judge.

Appearances: Janet L. Rice, Susan Orlansky, Assistant Public Defenders, and Dana Fabe, Public Defender, Anchorage, for Appellant. Kristen L. Young, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Norman C. Gorsuch, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Singleton, Judges.

COATS, Judge.

Michael T. Smith was convicted of two counts of murder in the first degree, AS 11.41.100(a)(1). Judge Justin Ripley sentenced Smith to fifty years' imprisonment for one count of murder and sixty years' imprisonment on the other count of murder. These sentences were made consecutive to each other. Smith appeals his conviction and sentence to this court. We affirm.

The evidence presented at trial showed that Michael Smith had been dealing in cocaine and Ron Cole was his supplier. Smith owed Cole over $15,000 from the various cocaine dealings and Cole was pressing Smith for the money. Smith went over to Ron Cole's residence on or about the twenty-eighth day of September 1981. At that time he shot and killed both Ron Cole and Cole's wife, Darcell Cole.

Smith left Anchorage after the killings. He returned on October 10, 1981, and was arrested at the airport on drug charges. He was taken to trooper headquarters where he was interviewed by Troopers Thomas Sterns and Chuck Miller. Smith initially denied any involvement in the Cole homicides but later admitted that he killed Ron and Darcell Cole.

At trial, Smith defended on the ground of insanity. He claimed that at the time of the killings he was suffering from cocaine psychosis and that because of this psychosis he believed that it was necessary for him to kill the Coles to protect himself and his family. The

jury rejected this defense and convicted Smith of two counts of first-degree murder.

THE CONFESSION

Smith first argues that Judge Ripley erred in not suppressing the confession which he made to Troopers Sterns and Miller. Smith's argument turns on the fact that during the interview he indicated that he might want an attorney.

Under the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966), the prosecution may not use statements stemming from custodial interrogation unless prior to any questioning, the person in warned "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444, 16 L.Ed.2d at 706-07.

The procedure to be followed by the police when a defendant requests counsel differs depending upon the nature of that request. Generally, where a defendant states that he wants an attorney, police must cease interrogation until an attorney is present. 384 U.S. at 474, 16 L.Ed.2d at 723. However, courts have recognized that "[w]here the suspect's desires are expressed in . . . an equivocal fashion, it is permissible for the questioning official to make further inquiry to clarify the suspect's wishes." *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (*en banc*), *cert. denied*, 444 U.S. 981, 62 L.Ed.2d

409 (1979).[1] It is therefore important for purposes of this analysis to determine whether in fact Smith's request was equivocal,[2] or whether Smith's mention of an attorney during the course of questioning was an invocation of his right to an attorney, thereby requiring the officers to cease interrogation. Resolution of this issue requires us to describe the interview in greater detail.

When Smith was arrested at the airport, the arresting officers warned him of his *Miranda* rights. Smith told the arresting officers that he wanted to speak to somebody in charge of major crimes about some recent killings in Anchorage. Smith was taken to the State Troopers office where he was interviewed by Troopers Stearns and Miller.

At the beginning of his interview with Stearns and Miller, Smith was again advised of his rights. Smith indicated that he understood his rights and had waived them verbally at the airport. The critical part of the interview follows:

> STEARNS: We have tipped the scales of . . . of being anymore than what we were before, and that's asking questions about dope . . .
>
> SMITH: Every . . . everything's fine.
>
> STEARNS: Dealings and Ron Cole.
>
> SMITH: Everything's fine. I understand you need information and I'm willing to supply everything I know.

STEARNS: Okay. So, the answer to the question of whether you had any involvement with the death of RON COLE is no you did not, is that right?

SMITH: That's right.

STEARNS: Okay, and you have no idea who did kill RON COLE?

SMITH: No.

STEARNS: And you suspect no one of killing RON COLE that you personally know or have any contact with?

SMITH: I wouldn't be able to give you a suspect, no.

STEARNS: Okay, and I guess the question that I asked that set you off to wondering what CHUCK and I were up to ah . . . I . . . I guess what I asked was, you didn't get yourself into a position where you had to protect yourself and that . . . that tended to . . . to at least make you want to ask some question of us.

SMITH: It . . . it, well, I'm not stupid, okay.

STEARNS: Okay.

SMITH: I saw . . . saw your line of questions. I saw where you were heading.

STEARNS: Un'huh.

SMITH: It's alright.

STEARNS: Okay. So, I take it that you did not get yourself in a position where you had to protect yourself, is that a . . . is that yes or no?

SMITH: No . . . .

STEARNS: Okay, so umm . . . we're not in a park where you're . . . you're afraid to say anything that you're out there and the things went bad and you had to protect yourself, that's out of the question, you didn't have anything to do with his death.

SMITH: *Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?*

MILLER: Well, it . . . it wouldn't be fair to you to say that we weren't MIKE.

STEARNS: Yea.

SMITH: *Because if you are, it's . . . it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.*

MILLER: Well MIKE, you yourself pointed out that . . . that anybody that might be found in that notebook would certainly have reason enough to kill him.

SMITH: Yeah. I admitted, my name is probably in it.

STEARNS: And certainly you . . . you know, let . . . let's face it, you're a person who dealt with RON COLE, and you're a person who owed him a lot of money and if you for one minute sat down in a room here after us explaining exactly what our job was and what we were doing, if you for one minute didn't picture yourself as a suspect then, okay, then I would certainly forsee that if you've reached that point in your mind now, you're . . . we have no choice but to say well, he's . . . he's told us everything about what the suspect should look like, and we're sitting here saying, well you're . . . you're right, we think that's probably what the suspect looks like too.

SMITH: Yeah.

STEARNS: Okay. And if you for one minute think that we don't think the suspect is someone who is friends with him, someone who dealt with dope and someone who was in debt to him, then absolutely, you're correct.

SMITH: Sure.

STEARNS: And we have no choice but . . . but to eliminate suspects right? I mean, that's our job.

SMITH: That's fine.

STEARNS: Okay. And that's where we're coming from.

SMITH: I know, but I'm saying there's probably a . . . at least a dozen people like me that have known him for years and in the same position. They owe him money. They're friends; in the same position as I am.

STEARNS: And I don't, you know, I don't for one minute at all, okay, want to interrupt your . . . your train of thought or your needs or your necessities, okay, and *we talked about the rights sheet, you're aware of them; been advised of your rights at least twice today, okay.*

SMITH: Yes.

STEARNS: *And you signed it and you're aware . . . and you're aware that it says on there any time you feel that you want counsel, that's it, okay. So, don't misunderstand CHUCK and I. You want counsel, well . . . by God don't . . . don't hesitate to get yourself counsel. You want to talk to us about RON COLE'S dealings, you want to talk to us about the murder and suspects, anybody, will talk to you. If you want a lawyer to do that, then feel free. Okay. I don't think . . . I don't think . . .* [3]

SMITH: *I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know.*

MILLER: Alright. Well, you . . . you heard what . . . you heard what I said. I . . . you yourself say anybody that would be in that notebook could be . . . could be logical suspect, and you certainly agree, at least with our line of reasoning, in picturing the kind of person we have as a suspect, an associate, somebody that dealt dope and somebody that's in notebook and in debt up to his ass.

SMITH: Um-hum.

> MILLER: Now MIKE, you've sit here for the last hour or so and we've . . . we've talked about your background; you've been pretty open and honest at least what we know about you, okay.
>
> SMITH: Um'hum.
>
> MILLER: Ah, in regards with your dealings with RON . . . [Emphasis added.]

Shortly after this exchange, the trooper shut off the tape to get some coffee. According to the troopers, during this period of time Smith admitted that he killed the Coles. The tape recorder was then turned on again and Smith repeated his confession.

Judge Ripley concluded that Smith's remarks about an attorney, viewed in context, simply indicated that Smith was aware that he had a right to counsel, that he was undecided whether to invoke the right to counsel or go forward, and that he ultimately elected to not invoke his right to counsel but continued to talk to the police. We believe that the record supports Judge Ripley's conclusion.[4] We note that when Smith first brought up the question of whether he should talk to a lawyer, he wanted to know if he was a suspect. Smith asked the troopers whether he was a suspect and Trooper Sterns answered by telling Smith that he was a suspect. Sterns also reminded Smith of his right to an attorney at that point, and gestured towards a telephone

where Smith could call an attorney. Smith then indicated that he was trying to decide whether to contact an attorney, but continued with the interview. Under these circumstances, Judge Ripley could properly conclude that Smith never invoked his right to an attorney, was made fully aware of that right, and chose to continue the interview. *See Nashoalook v. State*, 663 P.2d 975, 977-980 (Alaska App. 1983). We conclude that Judge Ripley did not err in deciding that Smith knowingly and intelligently waived his right to counsel.

THE ARMED ROBBERY CONVICTION

Smith next argues that Judge Ripley erred in allowing the state to ask a character witness about Smith's former conviction for armed robbery. The record reflects that Judge Ripley granted a protective order prohibiting the state from introducing "evidence . . . implying the existence of any inadmissible conviction," pursuant to Evidence Rule 609. Evidence Rule 609 concerns impeachment by evidence of conviction of a crime and provides, among other things, that a conviction over five years old is inadmissible against the accused in a criminal case. A.R.E. 609(b). Thus, the protective order precluded introducing evidence of Smith's 1969 California conviction of armed robbery. Smith, however, introduced evidence of his good reputation for peacefulness in the community through a character witness, David Quast. Judge Ripley allowed the prosecutor to ask Quast whether, in arriving at his

conclusion that Smith had a good reputation for peacefulness, he had considered the fact that Smith had been convicted of armed robbery in California in 1969.[5] Quast replied that he knew Smith had formerly been in jail, that he did not know the details of the crime, but that an armed robbery conviction did not influence or change his opinion of Smith's good reputation for peacefulness. Smith contends that Judge Ripley erred in allowing this cross-examination.

A character witness may be cross-examined about an accused's prior arrest or conviction which appears inconsistent with the opinion or reputation to which the character witness has previously testified. A.R.E. 405(a). In *Michelson v. United States*, 335 U.S. 469, 482, 93 L.Ed. 168, 177 (1948), the Supreme Court reasoned:

> The inquiry as to an arrest is permissible also because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.

335 U.S. at 483, 93 L.Ed. at 177. *See United States v. Edwards*, 549 F.2d 362, 367 (5th Cir.), *cert. denied*, 434 U.S. 828, 54 L.Ed.2d 87 (1977); *United States v. Lewis*, 482 F.2d 632, 638 (D.C. Cir. 1973).

Alaska Rule of Evidence 405(a) permits inquiry into specific acts on cross-examination "to prove the knowledge of a character witness" where character has been placed in issue. E.R.C. 81. Evidence Rule 405(a) provides:

> *Methods of Proving Character.*
>
> (a) *Reputation or Opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation in any community or group in which the individual habitually associated or by testimony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.* [Emphasis added.]

Since the cross-examination of Quast is allowed under Evidence Rule 405(a), the question which this case presents is whether the probative value of the inquiry about the prior conviction outweighs the danger of unfair prejudice. A.R.E. 403. This balancing process is entrusted to the discretion of the trial judge and on appeal we are to reverse the judge's decision only where there is an abuse of discretion. *Alaska Northern Dev. v. Alyeska Pipeline Serv.*, 666 P.2d 33, 42 (Alaska 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 706, 79 L.Ed.2d 170 (1984).

Smith argues that the 1969 armed robbery

conviction was too remote in time to have significant probative value and that his participation in the crime was minimal so that the conviction shed little light on his character. He also points out that his character witness, Quast, testified that he had only known Smith since 1976. He argues that asking Quast about a 1969 armed robbery was not relevant to Quast's testimony.

The purpose of allowing cross-examination of character witnesses concerning prior convictions was set forth in *United States v. Edwards*, 549 F.2d at 367:

> Allowing evidence of convictions under Rule 609(b) is meant to impeach the witness with respect to *his* truth and veracity and also the limiting of the time for use of convictions allows for rehabilitation of that witness. But *allowing cross-examination of character witnesses as to their having heard of prior convictions or arrests of a defendant shows whether he has knowledge of defendant's reputation and whether that knowledge influences his opinion in any way*. [Emphasis added.]

See also Michelson v. United States, 335 U.S. 469, 93 L.Ed. 168 (1948) (prosecutor allowed to question character witness about defendant's 27-year-old arrest for receiving stolen goods); *United States v. Booz*, 451 F.2d 719 (3d Cir. 1971) (prosecutor allowed to ask reputation witness about defendant's 13-year-old court martial). We conclude that Judge Ripley did not abuse his discretion in allowing the prosecutor to inquire into Smith's prior

armed robbery conviction. Smith elected to introduce evidence of his reputation for peacefulness. He could not necessarily limit the testimony to his character for peacefulness from 1976 on. *See Salud v. State*, 630 P.2d 1008, 1010-11 (Alaska App. 1981) (once accused offers evidence of his character for peacefulness, prosecution may rebut with evidence of reputation of violence). We find no error.

THE FAILURE TO DEFINE "MENTAL DISEASE OR DEFECT"

Smith's defense at trial was based on AS 12.45.083, the statutory test for insanity in effect at the time he killed the Coles. Former AS 12.45.083 provides in pertinent part:

> (a) A person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> (b) Reliance on mental disease or defect as excluding responsibility is an affirmative defense. The burden of proof beyond a reasonable doubt does not require the prosecution to disprove an affirmative defense unless and until there is evidence supporting the defense. The requirement of evidence supporting the affirmative defense is

> not satisfied solely by evidence of an abnormality which is manifested only by repeated criminal or otherwise anti-social conduct.

Former AS 12.45.083 was patterned after the substantial capacity test developed by the American Law Institute. Neither the Alaska test nor the A.L.I. test defines "mental disease or defect." Nor are there cases in Alaska which have attempted to supply the definition.

To fill the void, Smith requested that the jury be given the following instruction:

> As used in these instructions, the term mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.

Judge Ripley refused to give this instruction. He concluded that the term "mental disease or defect," to the extent it was to be defined, had been defined by the legislature and that it was up to the jury to apply the legislature's definition to the facts.

The instructions that Judge Ripley gave were taken from the Alaska Pattern Jury Instructions which closely track the language of former AS 12.45.083:

> The State must prove beyond a reasonable doubt that at the time of the criminal act, the defendant did not lack the substantial capacity either to

> appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law as a result of mental disease or defect.
>
> . . . .
>
> The defense of non-responsibility due to mental disease or defect is not satisfied solely by evidence of an abnormality which is manifested only by repeated criminal or otherwise antisocial conduct.

Smith argues that because the trial court failed to define the term "mental disease or defect," the court's instructions were ambiguous. He argues that as a result, the jury was confused and relied too heavily on expert opinion to supply the meaning.

Smith's proposed instruction was taken from *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962). The *McDonald* definition of "mental disease or defect" was adopted by the D.C. Circuit Court to be used in conjunction with the *Durham* test. It was later grafted onto the A.L.I. test of substantial capacity which replaced the *Durham* test in that jurisdiction. *United States v. Browner*, 471 F.2d 969, 990-92 (D.C. Cir. 1972).

While there are at least two states which have adopted the A.L.I. test plus the *McDonald* definition of "mental disease or defect," the *McDonald* definition has not widely been accepted. One writer concludes that *McDonald* is even more sweeping and vague than the

M'Naghten test.

> Under the *McDonald* definition the trier of fact who finds the mental and emotional processes "substantially impaired" must still ask: "affected" and "inpaired" in what way? The obvious answer is: affected and impaired in a way which results from an "abnormal condition of mind." But surely not just *any* abnormality of mind will do for the present purpose. A person who is in a state of self-induced alcoholic or narcotic intoxication is in an abnormal condition of the mind which can often substantially affect intellectual and emotional processes and impair behavior controls. Again, unavoidable or negligently induced extreme fatigue and exhaustion is associated with an abnormal condition of mind which may substantially affect intellect and emotion and impair behavior control. But surely these kinds of abnormal conditions of the mind are not appropriate for the purpose of excusing from criminal responsibility by reason of insanity.
>
> What is clearly needed is a statement of that specific sort of mental abnormality which will help to establish the insanity plea. What kind of abnormal mental condition must the court have tacitly had in mind when it formulated the definition? One possible

answer is the specific form of mental abnormality whose presence, appropriately connected to the act, excuses from criminal responsibility. But this answer is obviously defective on two grounds: (a) it makes the whole test a question begging one since the mental disease test is supposed to provide an independent criterion of the absence of criminal responsibility; (b) it is still too general, for it is not difficult to think of mental abnormalities whose presence, when appropriately connected to the act, typically do excuse from criminal responsibility but which do not provide the basis for an insanity plea. Such a condition would be produced, for example, by nonnegligently induced exhaustion. Another possible answer would restrict the insanity plea to those mental abnormalities which exist in involuntarily induced disorders in order to exclude mental abnormalities produced by exhaustion, intoxication, concussion, and the like. But this also renders the *McDonald* definition hopelessly question begging. The point of using the phrase "abnormal condition of the mind" was precisely to help define what the court meant by "mental disease."

Thus, the court in *McDonald* recognizes the inadequacy of treating mental disease as a medical concept and pro-

> poses that since this concept serves specific legal purposes it should be defined accordingly. However, the opinion fails to build on a constructive account of that legal role and thereby offers a definition which compounds the present confusion.

Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests*, 33 Univ. Chicago L. Rev. 229, 242-43 (1966). (Footnotes omitted.) From Professor Fingarette's analysis it would appear that the *McDonald* definition, had it been given, would have proved favorable to Smith in that it could have encompassed Smith's drug-induced psychosis.

The state argues, however, that the trial court was correct in not using the *McDonald* definition because to do so would have resulted in an improper modification of Alaska's insanity statute. We believe the state's argument is meritorious.

As the state points out, the court in *Browner* was not clarifying the A.L.I. test but was in fact creating a new insanity rule. In Alaska, it was the legislature and not the court which adopted the A.L.I. test. The Alaska test does not define "mental disease or defect" other than by exclusion. An instruction using the *McDonald* definition arguably would broaden application of that test. "It is the legislature, not the court, that has the authority to change statutory laws." *State v. Crenshaw*, 659 P.2d 488, 497 (Wash. 1983).[6] The court in *Crenshaw* held that where the legislature has acted, any instruction

with language which differs from that of the statute would be improper. *Id.* at 498.

While it is true the phrase "mental disease or defect" may be susceptible of differing interpretations, it appears that the legislature in adopting the A.L.I. test made a conscious decision to leave the phrase undefined. As one critic writes, because "a precise definition of insanity is impossible . . . it is entirely sensible to leave 'mental disease' undefined, at least so long as it is modified by a statement of minimal conditions for being held to account under a system of criminal law." A. S. Goldstein, *The Insanity Defense* 87 (1967). Until we know what really causes criminal conduct, "the insanity defense will have to be framed in a way which permits juries to express the feelings of the community on the subject of responsibility." *Id.* at 91.[7]

We conclude that Judge Ripley did not err in failing to further define the term "mental disease or defect."

THE SENTENCE

Smith was convicted of two counts of first-degree murder. Alaska Statute 12.55.125(a) provides that "[a] defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years." Judge Ripley sentenced Smith to 50 years for Count I and 60 years for Count II. The sentences are to run consecutively. Smith appeals this sentence as excessive. He also argues that "the trial court erred . . . in imposing consecutive sentences in excess of the maximum possible for one count without finding, explicitly or implicitly, that confining Smith for 110 years would be necessary to protect the public." *See Lacquement v. State*, 644 P.2d 856, 862 (Alaska App. 1982).

In sentencing Smith, Judge Ripley emphasized Smith's age and pattern of criminal behavior. He also noted the particular facts of the case which indicated that Smith had planned the killings in advance. Judge Ripley concluded that given Smith's age, criminal record, and the facts of the instant offenses, Smith's chances for rehabilitation were slight and the risk to society was great if he were ever released from prison. We believe that Judge Ripley's findings are supported by the record and that they support the sentences which he imposed, including the need to impose those sentences consecutively. *See Neal v. State*, 628 P.2d 19, 21 (Alaska 1981). *See also Nukapigak v. State*, 663 P.2d 943 (Alaska 1983).

The conviction and sentences are AFFIRMED.

FOOTNOTES

1. Nash v. Estelle, 597 F.2d 513 (5th Cir.) (*en banc*) *cert. denied*, 444 U.S. 981, 62 L.Ed.2d 409 (1979), was cited with approval in Edwards v. Arizona, 451 U.S. 477, 486 n.9, 68 L.Ed. 378, 387 n.9 (1981).

2. Webster defines "equivocal" to mean:

> (1) that can have more than one interpretation; having two or more meanings; purposely vague, misleading, or ambiguous . . . ; (2) uncertain; undecided; doubtful . . . ; (3) suspicious; questionable . . . .

Webster's New World Dictionary, 474 (2d ed. 1980).

3. In his affidavit which was attached to the state's opposition to Smith's motion to suppress, Trooper Stearns stated: "When I said to defendant ' . . . feel free . . . ', I did remind Smith he had been advised of his rights, twice, and that a request for counsel would end the questioning, and I was gesturing to the telephone nearby, which defendant was free to use, if he wished, to call an attorney."

4. In reviewing this issue, we review the record in the light most favorable to the prevailing party, in this case, the state. Giacomazzi v. State, 633 P.2d 218, 222-23 (Alaska 1981).

5. Judge Ripley had warned Smith earlier in the

trial that if he had witnesses testify about his reputation for peacefulness, there was a possibility that the prosecution would be able to cross-examine those witnesses about whether they had considered Smith's 1969 armed robbery conviction.

6. In *Crenshaw*, the Washington Supreme Court stated that where the legislature had chosen to codify the *M'Naghten* test and not include a definition of "moral" rather than "legal" wrong, it was preferable to have the test presented to the jury without elaboration.

7. The Alaska Legislature has included a definition for "mental disease or defect" as part of its 1982 reform of the insanity defense. AS 12.47.130(3) defines "mental disease or defect" as:

> [A] disorder of thought or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life; "mental disease or defect" also includes mental retardation, which means a significantly below average general intellectual functioning that impairs a person's ability to adapt or to cope with the ordinary demands of life.

IN THE SUPREME COURT OF THE STATE OF ALASKA

MICHAEL T. SMITH,	)	
	)	
Petitioner,	)	Supreme Court No. S-591
	)	
vs.	)	
	)	ORDER
STATE OF ALASKA,	)	
	)	
Respondent.	)	
	)	

Court of Appeals No. 7093
Superior Court No. 3AN 81-6231 Cr.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices

On consideration of the petition for hearing filed on August 23, 1984 and the opposition to the petition filed on August 31, 19842

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on October 4, 1984.

CLERK OF THE SUPREME COURT

/s/
DAVID A. LAMPEN

[Rabinowitz, Chief Justice, and Moore, Justice, dissent. They would grant the petition.]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

MICHAEL T. SMITH, Petitioner, v. ROGER ENDELL, Commissioner of the Department of Corrections, State of Alaska, Respondent.	)	No. A84-583 Civil RECOMMENDATION RE PETITION FOR WRIT OF HABEAS CORPUS

Michael T. Smith, an Alaska State prisoner, who was sentenced to serve 50 and 60 years consecutively on two counts of first degree murder of Ron and Darcella Cole has filed a habeas corpus petition brought under 28 U.S.C. § 2254 directed at his July 23, 1982 Judgment of Conviction entered by the Superior Court, Third Judicial District, at Anchorage. For reasons stated herein, I RECOMMEND that the petition be DENIED.

Prior to trial, Smith moved to suppress his confession claiming that his *Miranda* rights were violated because he had requested a lawyer before the questioning ceased. The trial judge denied the motion to suppress, and the tape recorded confession was introduced at trial. The Alaska Court of Appeals affirmed

the conviction in an unpublished memorandum opinion and judgment dated July 25, 1984. The Supreme Court of Alaska denied Smith's petition for hearing. Smith did not file for post-conviction relief in State Court.

EXHAUSTION OF STATE REMEDIES

Although *Smith v. Illinois*, 105 S.Ct. 490 (1984) was decided subsequent to the Alaska Court of Appeals decision in the underlying case, respondent State of Alaska takes the position that *Smith v. Illinois* was not a significant change in the law and it is unlikely that the Alaska Courts would further consider Smith's claim on the merits if he brought a post-conviction action in State Court pursuant to Alaska Criminal Rule 35(c)(7). *See Marone v. State*, 653 P.2d 672 (Alaska Ct. App. 1982). *See also Giacomazzi v. State*, 633 P.2d 218, 222 (Alaska 1981), wherein the Alaska Supreme Court addressed the standard for determining the consequences of an accused's ambiguous or equivocal request for counsel when in custody. The Alaska Supreme Court adopted an approach that permits a limited inquiry for the purpose of clarification after an accused makes a statement that arguably might be construed as a request for counsel. Exhaustion does not demand repetitious applications to state courts. A prisoner need only fairly present his claims to the state courts once. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). I find that petitioner Smith has satisfied the exhaustion requirement by presenting the State Supreme Court with a fair opportunity to rule

on the merits and by having the issues raised before the Alaska Court of Appeals. *See Sherwood v. Tomkins*, 716 F.2d 632 (9th Cir. 1983).

FACTS DETERMINED BY STATE COURTS

Where the facts underlying a constitutional claim are in dispute, a federal court in a habeas corpus petition must conduct an evidentiary hearing if the petitioner did not receive a full and fair evidentiary hearing in a state court. 28 U.S.C. § 2254(d); *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Smith has not alleged any of the exceptions to § 2254(d) providing cause for an evidentiary hearing. Therefore, the determination on the merits of factual issues made by the state court evidenced by a written finding, written opinion or other reliable and adequate written indicia shall be presumed to be correct unless they lack fair support in the record. *Marshall v. Lonberger*, 103 S.Ct. 843, 850 (1983); *Sumner v. Mata*, 102 S.Ct. 1303 (1982) (per curiam).

Prior to trial in the State Court, the defendant filed a motion to suppress his confessions or admissions on grounds that such statements were made after he had indicated his desire and need for an attorney. It was Smith's position that he had stated his desire to exercise his right to silence and his right to counsel. The State argued that Smith as a matter of fact had not asked for an attorney nor had he asked that the question be stopped prior to making his incriminating statements. The trial judge found nothing in the evidence and record

before him to suggest that anything occurred to overbear the will of Smith with respect to his confessions. *See* oral ruling on defendant Smith's motion to suppress confession denied, Exhibit "E" to Docket Entry No. 7.

Superior Court Judge Ripley made the following findings: Smith had initially been advised from a *Miranda* card by Investigator Jones at the airport and was again readvised by Investigator Stearns; that Smith had signed the form of *Miranda* waiver card; that at page 2 of the confession there was an extensive discussion and warning of *Miranda* rights; and that Smith's remarks on the occasion underscored the fact that he knew that he had a right to counsel. Judge Ripley found from the record that Smith was undecided as to whether he needed an attorney and elected to go forward with making statements. He also found that the waiver was made knowingly and voluntarily and without coercion or mental impairment.

The Court of Appeals of the State of Alaska set forth the interview in some detail beginning at page 4 of the Memorandum Opinion and Judgment, No. 641 - July 25, 1984, as follows:

> STEARNS: We have tipped the scales of . . . of being anymore than what we were before, and that's asking questions about dope. . . .
>
> SMITH: Every . . . everything's fine.
>
> STEARNS: Dealings and Ron Cole.

SMITH: Everything's fine. I understand you need information and I'm willing to supply everything I know.

STEARNS: Okay. So, the answer to the question of whether you had any involvement with the death of RON COLE is no you did not, is that right?

SMITH: That's right.

STEARNS: Okay, and you have no idea who did kill RON COLE?

SMITH: No.

STEARNS: And you suspect no one of killing RON COLE that you personally know or have any contact with?

SMITH: I wouldn't be able to give you a suspect, no.

STEARNS: Okay, and I guess the question that I asked that set you off to wondering what CHUCK and I were up to ah . . . I . . . I guess what I asked was, you didn't get yourself into a position where you had to protect yourself and that . . . that tended to . . . to at least make you want to ask some question of us.

SMITH: It . . . it, well, I'm not stupid,

okay.

STEARNS: Okay.

SMITH: I saw . . . saw your line of questions. I saw where you were heading.

STEARNS: Un'huh.

SMITH: It's alright.

STEARNS: Okay. So, I take it that you did not get yourself in a position where you had to protect yourself, is that a . . . is that yes or no?

SMITH: No . . . .

STEARNS: Okay, so umm . . . we're not in a park where you're . . . you're afraid to say anything that you're out there and the things went bad and you had to protect yourself, that's out of the question, you didn't have anything to do with his death.

SMITH: *Can I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?*

MILLER: Well, it . . . it wouldn't be fair to you to say that we weren't

MIKE.

STEARNS: Yea.

SMITH: *Because if you are, it's . . . it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.*

MILLER: Well MIKE, you yourself pointed out that . . . that anybody that might be found in that notebook would certainly have reason enough to kill him.

SMITH: Yeah. I admitted, my name is probably in it.

STEARNS: And certainly you . . . you know, let . . . let's face it, you're a person who dealt with RON COLE, and you're a person who owed him a lot of money and if you for one minute sat down in a room here after us explaining exactly what our job was and what we were doing, if you for one minute didn't picture yourself as a suspect then, okay, then I would certainly forsee that if you've reached that point in your mind now, you're . . . we have no choice but to say well, he's . . . he's told us everything about what the suspect should look like, and we're sitting here saying, well you're . . .

you're right, we think that's probably what the suspect looks like too.

SMITH: Yeah.

STEARNS: Okay. And if you for one minute think that we don't think the suspect is someone who is friends with him, someone who dealt with dope and someone who was in debt to him, then absolutely, you're correct.

SMITH: Sure.

STEARNS: And we have no choice but . . . but to eliminate suspects right? I mean, that's our job.

SMITH: That's fine.

STEARNS: Okay. And that's where we're coming from.

SMITH: I know, but I'm saying there's probably a . . . at least a dozen people like me that have known him for years and in the same position. They owe him money. They're friends; in the same position as I am.

STEARNS: And I don't, you know, I don't for one minute at all, okay, want to interrupt your . . . your train of thought or your needs or your necessities, okay, and *we talked about the*

rights sheet, you're aware of them; been advised of your rights at least twice today, okay.

SMITH: Yes.

STEARNS: *And you signed it and you're aware . . . and you're aware that it says on there any time you feel that you want counsel, that's it, okay. So, don't misunderstand CHUCK and I. You want counsel, well . . . by God don't . . . don't hesitate to get yourself counsel. You want to talk to us about RON COLE'S dealings, you want to talk to us about the murder and suspects, anybody, will talk to you. If you want a lawyer to do that, then feel free. Okay. I don't think . . . I don't think . . .* [3]

SMITH: *I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know.*

MILLER: Alright. Well, you . . . you heard what . . . you heard what I said. I . . . you yourself say anybody that would be in that notebook could be . . . could be logical suspect, and you certainly agree, at least with our line of reasoning, in picturing the kind of person we have as a suspect, an associate, somebody that dealt dope and somebody that's in notebook and

in debt up to his ass.

SMITH: Um-hum.

MILLER: Now MIKE, you've sit here for the last hour or so and we've . . . we've talked about your background; you've been pretty open and honest at least what we know about you, okay.

SMITH: Um'hum.

MILLER: Ah, in regards with your dealings with RON . . . [Emphasis added.]

LEGAL CONCLUSION REACHED BY STATE COURT

On appeal to the Court of Appeals of the State of Alaska, Smith argued that Judge Ripley had erred in not suppressing the confession which he made to Troopers Stearn and Miller on the basis that during the interview he had indicated that he might want an attorney. The Alaska Court of Appeals, citing *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979) and *Edwards v. Arizona*, 451 U.S. 477, 486 n.9 (1981), held that where a suspect's desires are expressed in equivocal terms, it is permissible for the questioning officer to make further inquiry in order to clarify the suspect's desires. The Court of Appeals recognized that an analysis of the confession issue required particular attention to the facts of the

interview to determine whether, in fact, Smith's request was equivocal or amounted to an invocation of his right to an attorney, thereby requiring the officers to cease interrogation.

ANALYSIS OF FEDERAL CONSTITUTIONAL CLAIM

In his federal habeas petition, Smith asserts that his confession should have been excluded because the Court of Appeals misapplied the federal constitutional standard dealing with a suspect's right to counsel. The federal habeas court is bound by the State Court's findings of fact unless such finding is shown by convincing evidence to be erroneous. The ultimate issue of invoking or waiving a right to counsel is a mixed question of law and fact.

The presumption of correctness must be applied to the factual component of the questions presented by this federal habeas petition. *Price v. Wainwright*, 37 Crim. L. Rep. 2216 (11th Cir. 1985). The Court of Appeals reached the legal conclusion that Smith had not invoked his right to an attorney since his request concerning an attorney was equivocal.

Where an interviewee states that he wants an attorney, interrogations must cease until an attorney is present. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966); *Edwards v. Arizona*, 451 U.S. 477, 485 (1981); *Michigan v. Moseley*, 423 U.S. 96, 104 n.10, 109-111 (1975). *Miranda* prohibits the prosecution from using statements stemming from custodial interrogation unless prior to

any questioning, the person is warned that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. In his arguments to the Court of Appeals, Smith argued that the investigators had ignored his request for an attorney, did not stop the interrogation, but continued to elicit responses from him to "subjugate" him to the will of his examiners and thereby undermine his privilege against compulsory self-incrimination. The Court of Appeals upheld the trial court's decision that Smith had not requested an attorney in such a manner as to require the interrogation to cease.

Petitioner Smith relies upon *Smith v. Illinois*, *supra*, as dispositive of his petition for habeas corpus relief. In that case, the Supreme Court granted certiorari in a case wherein the petitioner, Steven Smith, contended that the police had improperly elicited a confession from him after he clearly had requested the assistance of counsel and that the confession should have been suppressed by the trial court as violative of *Miranda v. Arizona*, *supra*, and *Edwards v. Arizona*, *supra*. Previously, the Illinois Supreme Court had held that Steven Smith's responses to continued police questioning rendered his initial request for counsel "ambiguous" thereby not requiring the officers to terminate their questioning. The Supreme Court noted that under *Miranda* and *Edwards*, an accused's post-request responses to further interrogation may not be used to cast

doubt on the clarity of his initial request for counsel. The Supreme Court found no ambiguity in Smith's initial request and reversed his conviction of armed robbery.

Smith v. Illinois acknowledged the existence of a conflict among the courts that had previously addressed the relevance of alleged ambiguities or equivocations that either preceded an accused's purported request for counsel or were a part of the request itself.[1] In *Smith*, the Supreme Court distinguished the case before it stating that neither of these conflicting circumstances pertained. "The courts below were able to construe Smith's request for counsel as 'ambiguous' *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, 'considered in total,' Smith's 'statements' were equivocal." *Id.* at 494. [emphasis in original].[2] The Supreme Court held that a statement is either an assertion of the right to counsel or it is not. "Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." This restraint on police interrogation, the court noted, had previously been set forth as a prophylactic rule designed to protect an accused in police custody from being badgered by police officers. *See Id.* n.2, citing *Miranda v. Arizona*, *supra*; *Fare v. Michael C.*, 442 U.S. 707, 719 (1979) (an accused's request for an attorney is per se an invocation of his Fifth Amendment rights requiring that all interrogation cease); *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980); *Wyrick v. Fields*, 459 U.S. 42, 45-46 (1982) (per curiam); *Edwards v. Arizona*, *supra*; *Oregon*

v. Bradshaw, 103 S.Ct. 2830, 2834 (1983); and the more recent case of *Solem v. Strumes*, 104 S.Ct. 1338 (1984).

In *Smith v. Illinois*, *supra*, the Supreme Court found that the detective did not even initially terminate their questioning once Steven Smith had invoked his right to counsel. The court construed Smith's statement: "Ugh, yeah. I'd like to do that" which was made after Smith had learned that he had the right to his counsel's presence as an unambiguous request for counsel. The Supreme Court disapproved continued police questioning after a nonambiguous request for counsel is made regardless of whether such continued inquiry in retrospect would have a tendency to dissipate the accused's initial request for counsel. "No authority, . . . permits the interrogator to proceed . . . as if the defendant had requested nothing in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." *Id.* at 495 quoting dissenting Justice Simon of the Illinois Supreme Court.

The Alaska Court of Appeals recognized the need to determine whether, in fact, Smith's request for an attorney was equivocal or whether it constituted an invocation of his right to an attorney. That court agreed with Judge Ripley's conclusion that Smith's remarks about an attorney viewed in context indicated that Smith was undecided whether to invoke the right to counsel. The Court of Appeals affirmed the District Judge's denial of the suppression motion only in the context of all of the circumstances. Since Michael Smith made

more than one reference to an attorney, it is not clear whether the Court of Appeals used Smith's statements made after these particular requests to determine the clarity of his previous remarks concerning counsel. *Smith v. Illinois* holds that an accused's post-request responses to further interrogation may not be used to cast doubt or clarity on his initial request for counsel.

The Court of Appeals determined that Smith's statements regarding the presence of an attorney collectively did not constitute a present request for counsel. Whether Michael Smith effectively asserted his right to counsel *at any time* during the colloquy in which the incriminating statements were made is a question of federal constitutional law. *Brewer v. Williams*, 430 U.S. 387 (1978). The issue requires an application of constitutional principles to the facts as found. *Id.* at 1242; *Brown v. Allen*, 344 U.S. 443, 507 (1953).

After the investigators responded to Smith's question: "Are you looking at me as a suspect?" by indicating yes they were, the prior condition imposed by Smith, that is, that he wanted counsel if he were being considered a suspect had been met. Constitutional law, however, does not require the troopers to recognize the fulfillment of this condition as an invocation of the right to counsel without seeking further clarification. *Miranda* prohibits only continued interrogation. All communication between a suspect and a law enforcement officer is not barred after the suspect asserts his right to counsel. *United States v. Rodriquez-Gastelum*, 569 F.2d 482 (9th Cir. 1978) (en banc).

In the instant case, during his interrogation by Investigators Stearns and Miller, Michael Smith first raised the topic of an attorney be asking if he could talk to a lawyer.[3] Smith explained to the investigators why he had asked about an attorney by stating that he thought they were looking at him as a suspect to the murder.[4] Smith specifically asked if they were looking at him as a suspect.[5] Trooper Miller answered Smith's second question by telling him that he was a suspect. Trooper Stearns agreed.[6] The Alaska Courts treated this dialogue by Smith as insufficient to constitute a request for counsel. Unlike the statements made by Steven Smith in *Smith v. Illinois*, *supra*, the questions asked by Petitioner Michael Smith do not suggest an unequivocal invocation of counsel.[7] The investigators responded by immediately addressing only the latter question of whether they were looking at Smith as a suspect. Upon receiving an affirmative answer, Smith's remarks were that if the troopers were looking at him as a suspect, then he thought he should have counsel.[8] Unlike the statements considered in *Smith v. Illinois*, these statements regarding counsel were conditional. A statement of conditional intent is an ambiguous statement, at least in the context of this dialogue. The colloquy proceeded with the investigators explaining to Smith why he was considered a suspect. Investigator Stearns then reminded Smith of the advisement of rights form that he had signed. Stearns told Smith that if he wanted counsel not to hesitate to get counsel, but that if he wanted to talk about the murder and suspects, then

the officers would talk to him. Smith responded: "I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know."

None of these remarks of petitioner Michael Smith legally constituted an assertion of the right to the assistance of counsel such as would require interrogation to cease under *Smith v. Illinois*, or *Edwards v. Arizona*, or any other Supreme Court case cited in the *Smith* opinion. Smith's reference to his right to counsel was ambiguous with respect to the assertion of such a right, and *Edwards v. Arizona* and *Miranda v. Arizona* do not require that all questioning of Smith as a suspect should have ceased at that point.

In *Edwards v. Arizona*, the court found that Edwards had expressed his desire to deal with the police only through counsel. *Edwards* at 484-85. *Edwards* holds that a criminal defendant's rights are violated by use of a confession obtained by police-instigated interrogation without counsel present after an attorney has been requested. In the instant case, Michael Smith did not invoke his right to counsel in the first instance; rather his asserted request for counsel itself was ambiguous. In such situations, the courts have addressed the issue of whether further questioning should have been limited to the ambiguities raised by the suspect and whether there was a subsequent knowing and intelligent waiver of the right to counsel. The Ninth Circuit has drawn a distinction between "an inquiry for the limited purpose of clarifying whether the suspect is invoking his

right to remain silent" or "has changed his mind regarding an earlier assertion of his 'rights.'" Questioning aimed at eliciting incriminating statements concerning the very subjects on which the defendant has invoked his right is prohibited by *Rhode Island v. Innis*. When it is unclear whether a suspect has indeed invoked his right to silence, the interrogator can ask questions designed to clarify whether or not a suspect intends to talk. *See e.g.*, *Nash v. Estelle*, 597 F.2d 513, 517 (5th Cir.) (en banc) (suspect's intent unclear when he expressed contradictory desires, "a desire for counsel and a desire to continue the interview without counsel."), *cert. denied*, 444 U.S. 981 (1979). *See also United States v. Riggs*, 537 F.2d 1219, 1222 (4th Cir. 1976) (suspect's statement that he had "no information" could be interpreted "as a mere declaration of ignorance not precluding further cooperation with the investigation.") In *Riggs*, the officers continued to interrogate Riggs instead of attempting to clarify his intent. The Fourth Circuit upheld as not clearly erroneous the trial court's finding that Riggs' statement was not only unclear but also more plausibly an expression of his ignorance than an invocation of his rights. The Fourth Circuit admonished the police, however, next time to inquire of the suspect as to the correct interpretation of his statement. *Id.* at 1222. *Miranda* approves of the use of clarifying questions. *See* 384 U.S. at 485. *Rhode Island v. Innis*, *supra*, instructs that the focus of the *Miranda* safeguards should be on the perceptions of the suspect rather than on the intent of the police. *See United States v. Webb*, 755 F.2d 382,

388 (5th Cir. 1985). *Smith v. Illinois, supra*, indicates that an unintentional violation of *Edwards v. Arizona* is a violation nonetheless.

Nash v. Estelle, supra, is distinguishable from the instant case on its facts. In *Nash*, the Fifth Circuit, en banc, upheld the district court's determination that the habeas petitioner had made an unambiguous request for counsel during the following exchange of remarks:

> Nash: If I want a lawyer present, I just put down [on the waiver form] I want him present? (Officer) Files: Please just tell us about it. Anytime we are talking and you decide that you need somebody else here, you just tell me about it and we will get somebody up here. Nash: Well I don't have the money to hire one, but I would like, you know, to have one appointed.
>
> Files: You want one to be appointed for you? Nash: Yes sir."

The en banc panel found that Nash's position regarding counsel was "equivocal" in that he expressed conflicting desires to have counsel and to continue the interrogation without counsel, so that Officer Files was entitled to continue the interview by asking "clarifying" questions. The four dissenting judges thought that the supposed need for clarification arose from interrogation that continued after Nash requested counsel. The dissenters found no equivocalness inherent in Nash's initial

request for counsel based upon a reading of the earlier transcript.

The en banc panel held that if a suspect utters an ambiguous statement that is unclear to the interrogating officer as to whether the suspect is in fact asserting the right to counsel, the officer is free to ask questions in order to ascertain what the suspect means. *See United States v. Riggs, supra.* This does not mean that an ambiguous statement that might be construed as a request for counsel is a free reign to the interrogator to ignore the request and proceed with the interrogation. Once the privilege to remain silent and the absence of counsel has been asserted, an interrogator must not seek its retraction by continued questioning. *See United States v. Massey*, 550 F.2d 300, 308 (5th Cir. 1978); *United States v. Crist*, 435 F.2d 354, 357 (7th Cir. 1970); *United States v. Clark*, 499 F.2d 802, 807 (4th Cir. 1974). *Miranda v. Arizona* discourages any such attempts and renders any purported waiver of counsel invalid. *See also Maglio v. Jago*, 580 F.2d 202 (6th Cir. 1978) (equivocal request for an attorney which the interrogating officer understood to be a request for the presence of an attorney and interrogator continued questioning.) Where a suspect's desires are expressed in an equivocal fashion, it is permissible for the questioning officer to make further inquiry to clarify the suspect's wishes. *United States v. Rodriguez-Gastelum, supra.*

Subsequent to Smith's equivocal statements regarding his desire to have counsel, the dialogue continued with a discussion as to the reasons for the focus

of the investigation upon Smith. Investigator Stearns told Smith where the investigators were "coming from" and then he brought up the matter of the advisement of rights form which had apprised Smith of his rights. Investigator Stearns reminded Smith that the form provided that if at any time he felt that he wanted counsel, then it was o.k. to request counsel and he should not hesitate to get himself counsel. In addition to reminding him of the advisement of his rights, Investigator Stearns gestured to a telephone nearby which defendant was free to use if he wished to call an attorney. Smith's immediate response was the following: "I don't know if I need one or not. That's why I'm trying to make my mind up, if I need to go that route for myself, you know." Soon after this exchange of remarks occurred, the troopers turned off the tape recorder to get some coffee. During this period of time, Smith admitted that he killed the Coles. The tape recorder was turned on again and Smith repeated his confession.

Subsequent to Smith's initial reference to counsel, the Troopers made statements as to the focus of their investigation and then as to Smith's right to counsel. Their statements did not embrace the form of further interrogation. Informing Smith of the available evidence against him in response to his question as to whether he was a suspect did not fall within the realm of interrogation. *See United States v. Davis*, 527 F.2d 1110 (9th Cir. 1975). The trooper's statements were not reasonably likely to discourage Smith from asserting his

rights to counsel or likely to have any undue influence or coercive effect on Smith's right to request the presence of counsel during an interrogation. Investigators Stearns and Miller might have focused more directly on Smith's equivocation as to whether he sought to invoke his right to counsel. However, their brief continuation of their discussion of the type of person they considered as a suspect was not error of a constitutional magnitude.

Reasonable latitude must be afforded to an interrogating officer to formulate answers to an accused's questions that contain an equivocal or ambiguous reference to the availability of counsel. Since Steven Smith continued to state that he was not sure whether he wanted an attorney after it was clear that he understood and had been advised of his right to have counsel, the officers were not required to cease their interrogation. Thus, Smith did not sufficiently invoke the right to counsel and this court need not determine whether the record would support a valid waiver of that right if the issue were present. At no time during questioning did Smith unequivocally indicate that he wished to remain silent. Investigators Stearns' and Miller's subsequent questioning did not exceed the permissible bounds of the "equivocalness exception." *Compare United States v. Rodriguez-Gastelum*, *supra*; *Pierce v. Cardwell*, 572 F.2d 1339 (9th Cir. 1978); *Nash v. Estelle*, *supra*; *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976).

For the foregoing reasons, the Petition for Writ of Habeas Corpus should be DENIED. IT IS SO RECOMMENDED.

DATED this 23rd day of October, 1985 at Anchorage, Alaska.

/s/ John D. Roberts
United States Magistrate

Pursuant to Magistrate Rule 12(C), a party seeking to object to this proposed finding or recommendation shall, within 10 days after the date of service of a copy of the recommendation, file written objections with the Clerk of the U.S. District Court or else the right to further appeal may be waived. Responses to the objections shall be filed within ten (10) days after receipt of the objections. The parties shall otherwise comply with the provisions of Magistrate Rule 12(C).

FOOTNOTES

1. Some courts took the approach that all questioning must cease upon any reference to counsel, however, ambiguous or equivocal whereas other courts permitted a limited inquiry for clarification after an accused makes a statement that arguably might be construed as a request for counsel.

2. Webster's New World Dictionary (2d ed. 1980) defines "equivocal" to mean: "(1) having two or more meanings; purposely vague, misleading, or ambiguous . . . ; (2) uncertain; undecided; doubtful . . . ; (3) suspicious; questionable . . . ."

3. Smith: Can I talk to a lawyer?

4. (Smith: continued) At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer.

5. (Smith continued): Are you looking at me as a suspect?

6. Stearns: Yeah.

7. If one considers only the declarative statement and not its immediate context, then the pertinent portion of that statement reads: "At this point, I think . . . I should talk to a lawyer." Although these words by themselves appear to be an unequivocal invocation of the right to counsel, we do not deem it appropriate to consider the words selectively since they were spoken in a single utterance which included two questions.

8. Smith: Because *if* you are, it's . . . it's a serious charge and I think I should have counsel, *if* that's where . . . what you're . . . where you're coming from, just tell me if you are." [emphasis supplied].

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MICHAEL T. SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
ROGER ENDELL, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF ALASKA,	)	No. A84-583 Civil
	)	
	)	SUPPLEMENTAL RECOMMENDATION
	)	
Respondent.	)	
	)	

Pursuant to Local Magistrate Rule 12(c), petitioner's Objections to the Magistrate's Recommendation Regarding Petition for Habeas Corpus together with the State respondent's response have been duly considered by the United States Magistrate. In his Objections, the petitioner asserts that in his colloquy with Investigator Stearns, Smith essentially stated that if you are looking at me as a suspect (then) I want to talk to a lawyer. Smith's remarks, however, do not constitute an unequivocal assertion of the right to counsel.[1] Smith's remarks did not unambiguously request counsel either conditionally or unconditionally. The Ninth Circuit Court of Appeals has recently commented on this area of the law in *United States v. Pierre Fouche*, ____ F.2d ____ (9th

Cir., November 19, 1985) as follows:

> The Supreme Court has not addressed what constitutes a valid assertion of the right to counsel. . . . In *Edwards*, the Court refers to a right to counsel that has been "specifically invoked." 451 U.S. at 482. In *Brewer v. Williams*, 430 U.S. 387, 404-05 (1977), the Court speaks of "clear [] expressions" of desire for the presence of counsel. No Ninth Circuit cases provide guidance.

The *Fouche* court rejected the position taken by the Sixth Circuit that an equivocal assertion of counsel is sufficient under *Miranda v. Arizona*, 384 U.S. 436 (1966) to invoke the right to counsel.[2] The Ninth Circuit has adopted as a more reasonable approach that taken by the Fifth Circuit which holds that where a suspect makes an equivocal assertion of counsel, the police must cease all questioning, except that they may attempt to clarify the suspect's desire for counsel. "Questions aimed at clarifying the desire for counsel must be strictly limited to that purpose; they may not be used to elicit incriminating information. [citations omitted]." *Fouche*, *supra*. Law enforcement conversations that are fairly designed to clarify an ambiguity regarding an equivocal request for counsel do not automatically void a subsequent confession. *Id.* Thus, Investigator Stearns did not act improperly by addressing the ambiguity of whether or not Smith was a suspect as

well as reminding Smith of the previous advisement of rights that he received from the Investigator since this questioning was directed toward clarifying Smith's desire for counsel.

WHEREFORE, the Magistrate declines to modify his Recommendation.

DATED this 20th day of December, 1985 at Anchorage, Alaska.

/s/ JOHN D. ROBERTS
United States Magistrate

Pursuant to Magistrate Rule 12(C), a party seeking to object to this proposed finding or recommendation shall, within 10 days after the date of service of a copy of the recommendation, file written objections with the Clerk of the U.S. District Court or else the right to further appeal may be waived. Responses to the objections shall be filed within 10 days after receipt of the objections. The parties shall otherwise comply with the provisions of Magistrate Rule 12(C).

FOOTNOTES

1. Smith: Because if you are, it's . . . it's a serious charge and I think I should have counsel, if that's where . . . what you're . . . where you're coming from, just tell me if you are.
See Memorandum Opinion and Judgment of the Court of Appeals of the State of Alaska (No. 641, July 25, 1984), p. 5, a copy of which is attached to Docket Entry No. 7.

2. See Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978) (citing Miranda's requirement that questioning cease if a suspect "indicates in any manner" that he wishes to consult an attorney before speaking.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MICHAEL T. SMITH, Petitioner, v. ROGER ENDELL, COMMISSIONER, DEPARTMENT OF CORRECTIONS, STATE OF ALASKA, Respondent.	No. A84-583 Civil ORDER (Recommendation of Magistrate Adopted)

Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 as an Alaska state prisoner. Petitioner has exhausted all state remedies available to him. He raised a question as to the use of a confession obtained by authorities at a time when Petitioner was not represented by counsel. The question raised is whether Petitioner effectively requested the assistance of counsel.

The United States Magistrate has reviewed Petitioner's arguments and authorities and has filed an extensive memorandum recommending denial of the petition.

Having reviewed the Magistrate's recommendations as well as his supplemental recommendations, the Court is satisfied that Petitioner's constitutional right to

counsel was not effectively invoked, and therefore the questioning which preceded and led to his confession was permissible. The recommendation of the United States Magistrate is adopted as supplemented. The petition for a writ of habeas corpus is denied.

DATED at Anchorage, Alaska, this 20th day of February, 1986.

/s/ United States District Judge